(1)

90-448

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FORD MOTOR COMPANY, ET AL.,
PETITIONERS

v.

CHRISTINE MAHNE,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ARTHUR R. MILLER
Langdell Hall
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4111

JOHN M. THOMAS
Ford Motor Company
One Parklane Boulevard
Suite 300, Parklane Towers West
Dearborn, Michigan 48126
(313) 322-6743

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
MARK I. LEVY
JAMES C. SCHROEDER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Whether the court of appeals in this diversity case departed from settled principles governing federal-court determinations of state law by (1) not following decisions of the state supreme and intermediate appellate courts, thereby encouraging forum shopping by federal diversity plaintiffs, (2) not deferring to the district court's interpretation of the law of the state in which it sits, and (3) not certifying the controlling state-law issues to the state supreme court.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties named in the caption, Donald Peterson and Harold MacDonald, who are present or retired officers of Ford Motor Company, were defendants-appellees in the courts below and are petitioners in this Court.

The subsidiaries of Ford Motor Company required to be disclosed under Sup. Ct. R. 29.1 are listed in Appendix F, *infra*, 24a-32a.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND RULES INVOLVED	2
STATEMENT	2
A. Background And Prior Proceedings	2
B. District Court Proceedings And Decision	4
C. The Court Of Appeals' Decision	5
REASONS FOR GRANTING THE PETITION	7
I. THE COURT OF APPEALS PLAINLY VIOLATED THE FUNDAMENTAL PRINCIPLES ESTABLISHED BY THIS COURT FOR DETERMINING STATE LAW UNDER *ERIE*	10
A. The Court Of Appeals Ignored Controlling State-Court Decisions	10
B. The Court Of Appeals Failed To Accord Due Deference To The District Court's Determination Of State Law	17
C. The Court Of Appeals Failed To Follow Available State Certification Procedures	20
II. THE COURT OF APPEALS' EGREGIOUS DISREGARD OF THIS COURT'S DIRECTIVES FOR DETERMINING STATE LAW UNDER *ERIE* WARRANTS REVIEW	25
CONCLUSION	28

APPENDIX A 1a
APPENDIX B 12a
APPENDIX C 19a
APPENDIX D 20a
APPENDIX E 22a
APPENDIX F 24a

TABLE OF AUTHORITIES

CASES:	*PAGE*
Abramson v. *Brownstein*, 897 F.2d 389 (9th Cir. 1990)	17
Ageloff v. *Delta Airlines Inc.*, 860 F.2d 379 (11th Cir. 1988)	22
Aldrich v. *Aldrich*, 375 U.S. 249 (1963)	21
Bellotti v. *Baird*, 428 U.S. 132 (1976)	21
Bendix Autolite Corp. v. *Midwesco Enterprises*, 486 U.S. 888 (1988)	17
Bernhardt v. *Polygraphic Co.*, 350 U.S. 198 (1956)	12, 19
Boardman v. *United Services Auto. Ass'n*, 742 F.2d 847 (5th Cir. 1984), cert. denied, 474 U.S. 980 (1985)	22
Bonelli v. *Volkswagen of America, Inc.*, 421 N.W.2d 213 (Mich. App.), lv. denied, 430 Mich. 896 (1988)	13
Brackenridge v. *Ametek, Inc.*, 517 So. 2d 667 (Fla. 1987), app. dismissed & cert. denied, 109 S. Ct. 30 (1988)	15
California v. *Taylor*, 353 U.S. 553 (1957)	11
Cassidy v. *Firestone Tire & Rubber Co.*, 495 So. 2d 801 (Fla. App. 1986), review denied, 506 So. 2d 1040 (Fla.), app. dismissed & cert. denied, 484 U.S. 802 (1987)	15
Clay v. *Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960)	21
Commissioner v. *Estate of Bosch*, 387 U.S. 456 (1967)	10
Day & Zimmermann, Inc. v. *Challoner*, 423 U.S. 3 (1975) (per curiam)	9
Diaz v. *Curtiss-Wright Corp.*, 519 So. 2d 610 (Fla. 1988)	15

Eddings v. *Volkswagenwerk, A.G.*, 835 F.2d 1369 (11th Cir.), cert. denied, 109 S. Ct. 68 (1988) .. 3, 4

Elkins v. *Moreno*, 435 U.S. 647 (1978) 21

Erickson v. *American Motors Corp.*, 683 F. Supp. 644 (E.D. Mich. 1988) 13

Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) ... *passim*

Exxon Co., U.S.A. v. *Banque de Paris et des Pays-Bas*, cert. granted, 485 U.S. 1020, vacated and remanded, 109 S. Ct. 299 (1988) 9

Ferens v. *John Deere Co.*, 110 S. Ct. 1274 (1990) .. 10

Fidelity Trust Co. v. *Field*, 311 U.S. 169 (1940) .. 11

Firestone v. *News-Press Pub. Co.*, 538 So. 2d 457 (Fla. 1989) 17

Gardner v. *New Jersey*, 329 U.S. 565 (1947) 20

Gibson v. *Phillips Petroleum Co.*, 352 U.S. 874 (1956) 9

Griffin v. *Ford Motor Co.*, No. TA 85-7244-WS (N.D. Fla. 1986), aff'd sub nom. *Eddings* v. *Volkswagenwerk, A.G.*, 835 F.2d 1369 (11th Cir.), cert. denied, 109 S. Ct. 68 (1988) 15

Guaranty Trust Co. v. *York*, 326 U.S. 99 (1945) ... 10, 17

Hampshire v. *Ford Motor Co.*, 399 N.W.2d 36 (Mich. App. 1986), lv. denied, 428 Mich. 852 (1987) 4, 5, 6, 12, 13, 14, 24

Hanna v. *Plumer*, 380 U.S. 460 (1965) 10

Hawks v. *Hamill*, 288 U.S. 52 (1933) 12

Hicks v. *Feiock*, 485 U.S. 624 (1988) 11

Jones v. *Heckler*, 754 F.2d 519 (4th Cir. 1985) .. 22

Juzwin v. *Asbestos Corp., Ltd.*, 900 F.2d 686 (3d Cir. 1990), petition for cert. pending, 59 U.S.L.W. 3074 (filed July 10, 1990) (No. 90-76) 17

Keyes v. *Fulton Mfg. Corp.*, 515 So. 2d 979 (Fla. 1987) 15

Kidney v. *Kolmar Laboratories, Inc.*, 808 F.2d 955 (2d Cir. 1987) 22

King v. *United Commercial Travelers*, 333 U.S. 153 (1948) 11

Klaxon Co. v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) 4

Lamb v. *Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144 (S.D. Fla. 1986), aff'd sub nom. *Eddings* v. *Volkswagenwerk, A.G.*, 835 F.2d 1369 (11th Cir.), cert. denied, 109 S. Ct. 68 (1988) 16

Lehman Brothers v. *Schein*, 416 U.S. 386 (1974) 9, 21, 22, 23, 24

Massachusetts v. *Feeney*, 429 U.S. 66 (1976) ... 21

Melendez v. *Dreis & Krump Mfg. Co.*, 515 So. 2d 735 (Fla. 1987) 4

Meredith v. *Winter Haven*, 320 U.S. 228 (1943) .. 10

Metropolitan Life Ins. Co. v. *Ward*, 470 U.S. 869 (1985) 17

Mills v. *Rogers*, 457 U.S. 291 (1982) 21

Nolan v. *Transocean Air Lines*, 365 U.S. 293 (1961) 12

Olmstead v. *Anderson*, 400 N.W.2d 292 (Mich. 1987) 4, 5, 13, 14

Pait v. *Ford Motor Co.*, 515 So. 2d 1278 (Fla. 1987) 15

Penwest Development Corp. v. *Dow Chemical Co.*, 667 F. Supp. 436 (E.D. Mich. 1987) 13

Perez v. *Ford Motor Co.*, 508 So. 2d 1339 (Fla. App. 1987), review denied, 520 So. 2d 585 (Fla. 1988) 15

Purty v. *McDonnell Douglas Corp.*, 515 So. 2d 983 (Fla. 1987) 15

Salve Regina College v. *Russell*, cert. granted, 58 U.S.L.W. 3834 (June 28, 1990) (No. 89-1629) 9, 18, 20, 28

Sandlin v. *Criminal Justice Standards & Training Comm'n*, 531 So. 2d 1344 (Fla. 1988) ... 17

Shaw v. *General Motors Corp.*, 518 So. 2d 900 (Fla. 1987) 15

Six Companies v. *Highway Dist.*, 311 U.S. 180 (1940) 12

Stoner v. *New York Life Ins. Co.*, 311 U.S. 464 (1940) 11

United States v. *Hohri*, 482 U.S. 64 (1987) 19

Virginia v. *American Booksellers Ass'n*, 484 U.S. 383 (1988) 21

Wallis v. *Grumman Corp.*, 515 So. 2d 1276 (Fla. 1987) 15

West v. *A. T. & T. Co.*, 311 U.S. 223 (1940) 11, 14

Zant v. *Stephens*, 456 U.S. 410 (1982) 21

STATUTES AND RULES:

Fla. Stat. Ann. § 95.031(2) (West 1982) 3

Fla. Stat. Ann. §§ 768.73 *et seq.* (West Supp. 1990) 26

Fla. R. App. P. 9.030(a)(2)(C) & 9.150(a) (West 1983) 7, 20

Mich. Ct. R. 7.305(B) (West Supp. 1989) 7, 20

MISCELLANEOUS:

1 ALMANAC OF THE FEDERAL JUDICIARY (Prentice Hall Law & Business 1990) 18

American Law Institute, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1968) 19

ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1988) 25

P. Bator, *et al.*, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988) 22

McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579 (1981) 26

MOODY'S INDUSTRIAL MANUAL 14

1A MOORE'S FEDERAL PRACTICE (2d ed. 1990):

¶ 0.203[5] 22

¶ 0.307[2] 12

¶ 0.307[3] 7

Note, *Erie R.R. and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures*, 18 HOFSTRA L. REV. 421 (1989) 23

Note, *Products Liability Statute of Repose—A Florida Perspective*, 11 NOVA L. REV. 849 (1987) .. 6, 16

Palm Beach Review, Apr. 16, 1990 28

REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) 26

C. Seron, CERTIFYING QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES (Federal Judicial Center 1983) 23

R. Stern, APPELLATE PRACTICE IN THE UNITED STATES (2d ed. 1989) 22, 24

C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION:

Vol. 17A (1988):

§ 4246 21

§ 4248 ..... 21, 24

Vol. 19 (1982):

§ 4507 ..... 10, 12

§ 4515 10

C. Wright, THE LAW OF FEDERAL COURTS (4th ed. 1983) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No.

FORD MOTOR COMPANY, ET AL.,
PETITIONERS

v.

CHRISTINE MAHNE,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ford Motor Company ("Ford") and two of its present or former officers respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 900 F.2d 83. The opinion of the district court (App. B, *infra*, 12a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1990. A timely petition for rehearing was denied on June 18, 1990 (App. D, *infra*, 20a-21a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The Florida statute of repose relevant to this product liability suit, and the Michigan and Florida provisions for certification of state-law issues to the state supreme court, are set forth in Appendix E, *infra*, 22a-23a.

STATEMENT

In this diversity case, the court of appeals departed from several fundamental principles laid down by this Court to guide federal courts in their determination of state law. By so doing, the court erred in interpreting the law of *both* Michigan and Florida. Not only is the erroneous ruling below a clear deviation from this Court's decisions and a serious affront to the law of two sovereign states, but—as this case graphically illustrates—it also will lead to widespread forum shopping by plaintiffs who can satisfy the requirements for diversity jurisdiction. Given the gravity of the court of appeals' error and the adverse systemic consequences it portends, review by this Court is warranted.

A. Background And Prior Proceedings

This is a product liability action arising out of an automobile accident that occurred in August 1985. Respondent's daughter was a back-seat passenger in a 1967 Ford Mustang driven by Todd Grossman that was hit in the rear by a 1982 Pontiac driven by Janet Hansen. As a result of the accident, respondent's daughter was severely injured. App., *infra*, 2a, 12a-13a.

The events leading up to this lawsuit arose in the State of Florida. Florida was the place where the accident occurred and respondent's daughter suffered injury. Respondent and her daughter were Florida residents (at the time

of both the accident and the initiation of litigation), as were the driver and the owners of the Mustang and the driver of the Pontiac. Both vehicles were registered in Florida. Finally, Ford was licensed to do, and did, business in Florida. In short, this was a Florida accident involving Florida residents driving Florida registered cars. The only non-Florida factors present were that Ford had its headquarters and principal place of business in Michigan and that the 1967 Ford Mustang had been designed, tested, and manufactured there 18 years before the accident. App., *infra*, 2a, 15a.

Despite the overwhelming nexus between the case and Florida, respondent initially filed suit against Ford in Michigan state court in January 1986. The court granted Ford's motion to dismiss without prejudice on the ground of *forum non conveniens*. *Mahne* v. *Ford Motor Co.*, No. 86 601535 NP (Mich. Cir. Ct., Wayne County, Mar. 27, 1986).

Following that dismissal in Michigan, respondent brought suit in Florida state court in November 1986 and named as defendants (in addition to Ford) the owners and operator of the Mustang and the operator of the Pontiac, all of whom resided in Florida. Ford moved for summary judgment on the ground that, because the Mustang had been manufactured in 1967, Florida's 12-year statute of repose barred respondent's product liability claims arising out of a 1985 accident.[1] Faced with the certain dis-

[1] The Florida statute of repose relevant to this lawsuit provides that "[a]ctions for products liability * * * must be begun within the period prescribed in this chapter * * * *but in any event within 12 years after the date of delivery of the completed product to its original purchaser.*" Fla. Stat. Ann. § 95.031(2) (West 1982) (emphasis added) (App., *infra*, 22a). A statute of repose is distinct from a statute of limitations. See *Eddings* v. *Volkswagenwerk*,

(Footnote continued on following page)

missal of her claim by the Florida court, respondent did not respond to Ford's motion but instead voluntarily dismissed her action against Ford without prejudice. App., *infra*, 2a.

B. District Court Proceedings And Decision

Having thus failed twice to bring a proper lawsuit against Ford, respondent returned to Michigan and filed this diversity action in the United States District Court for the Eastern District of Michigan. This time respondent sued Ford and two of its present or former officers who allegedly had participated in the design of the 1967 Mustang. Respondent's complaint asserted causes of action for negligence and breach of implied warranty.

Petitioners moved for summary judgment, arguing once again that Florida's 12-year statute of repose was applicable and precluded respondent's claims. The district court agreed and dismissed the complaint. App., *infra*, 12a-18a. The court recognized (*id.* at 13a) that a federal court in a diversity case is bound to follow the choice-of-law rules of the forum state. See *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). After a careful analysis of Michigan conflicts principles, the court concluded that Florida's statute of repose governed this case. In particular, relying on *Olmstead* v. *Anderson*, 400 N.W.2d 292 (Mich. 1987), and *Hampshire* v. *Ford Motor Co.*, 399 N.W.2d 36

---

[1] *continued*

A.G., 835 F.2d 1369, 1371-1372 n.2 (11th Cir.), cert. denied, 109 S. Ct. 68 (1988).

Subsequent to the events in this case, Florida amended its law to eliminate the statute of repose for product liability suits. That change has no application to causes of action (like the present one) that accrued before the July 1, 1986 effective date, and therefore it has no bearing here. See *Eddings*, 835 F.2d at 1373 n.6; *Melendez* v. *Dreis & Krump Mfg. Co.*, 515 So. 2d 735 (Fla. 1987).

(Mich. App. 1986), lv. denied, 428 Mich. 852 (1987), the court applied the Florida statute of repose because "Plaintiff resides in Florida, the accident occurred in Florida, the vehicles involved were registered and insured in Florida and the connections to Michigan are limited to the situs of Defendant's headquarters and the Plaintiff's choice of forum." App., *infra*, 15a. See also *id.* at 17a ("the cause of action accrued in Florida, * * * [and] Plaintiff is not a resident of the State of Michigan"). The court specifically found that *Hampshire* "presented virtually an identical set of facts" and "is controlling." *Id.* at 14a, 15a.

C. The Court Of Appeals' Decision

On respondent's appeal, the Sixth Circuit reversed the district court's ruling and held that Michigan law (which has no statute of repose) rather than Florida law applies. App., *infra*, 1a-11a. Based on its interpretation of *Olmstead*, the court of appeals believed that "in a suit brought in a Michigan court by a party who is not a citizen of Michigan against a Michigan resident, arising out of an accident that occurred outside of Michigan and in the state of the plaintiff's residence, * * * Michigan law as the forum law presumptively controls the litigation." *Id.* at 7a. Under the court of appeals' analysis, "there must be a rational reason to displace Michigan law," which requires that the foreign state have an "interest * * * in having its law applied"; absent such an interest by the foreign state, Michigan law governs regardless of whether Michigan has an interest of its own, "and the presumption that Michigan [law] applies is controlling." *Ibid.*

Turning to Florida law, the court of appeals concluded that the Florida statute of repose "was presumably designed to protect *Florida manufacturers* from liability for injuries caused by products which had been on the market

for over twelve years." App., *infra*, 10a (emphasis added). In reaching that conclusion, the court ignored a long line of Florida cases that consistently applied the statute of repose to out-of-state manufacturers (and specifically to Ford). See pages 14-15, *infra*. Rather than relying on this well-established Florida precedent, the court of appeals rested its interpretation of Florida law entirely on a student law review note (App., *infra*, 10a, citing Note, *Products Liability Statute of Repose—A Florida Perspective*, 11 NOVA L. REV. 849 (1987)), which, contrary to the court's reading, states only that "manufacturers' expanded liability"—not *Florida* manufacturers' expanded liability—"appears to be the primary influence in [the statute's] enactment" (11 NOVA L. REV. at 852).

Based on this misconstruction of Florida law, the court of appeals determined that even though Ford "does business in Florida," application in this case of "the Florida statute of repose would not benefit the interest it was designed to protect. Instead of protecting a Florida manufacturer as intended, the statute of repose would protect an out-of-state manufacturer at the expense of a Florida resident." App., *infra*, 10a-11a. Since the court found "no reason to extend the benefits of the Florida statute of repose to the Michigan defendants," it applied Michigan law "without regard to the nature or quality of Michigan's interests." *Id.* at 11a.

Because of its conclusion that "Florida has no interest in having its statute of repose applied" to out-of-state manufacturers (App., *infra*, 11a), the court of appeals found it unnecessary to "make a comparative analysis of the interests of Michigan and the foreign state as was done in *Hampshire*" (*id.* at 9a). In so ruling, the court of appeals did not disagree with the district court's assessment that *Hampshire* and the present case involved "virtually an identical set of facts" (*id.* at 14a); indeed, the court of ap-

peals' discussion makes clear that the operative facts in the two cases are indistinguishable. *Id.* at 9a. Nor did the court of appeals accord any deference to the district court's interpretation of Michigan law. Finally, notwithstanding its disagreement with the district court over the correct application of Michigan choice-of-law rules and the absence of any case law supporting its construction of Michigan or Florida law, the court of appeals did not certify the Michigan choice-of-law question to the Michigan Supreme Court pursuant to Mich. Ct. R. 7.305(B) (West Supp. 1989) (App., *infra*, 22a), nor did it certify the question of the construction of the Florida statute of repose to the Florida Supreme Court under Fla. R. App. P. 9.030(a)(2)(C) & 9.150(a) (West 1983) (App., *infra*, 22a-23a); on the contrary, the court *denied* both respondent's motion to certify the choice-of-law issue to the Michigan Supreme Court and Ford's petition for rehearing and for certification of the state-law issues to the Michigan and Florida Supreme Courts. *Id.* at 19a, 20a-21a.

REASONS FOR GRANTING THE PETITION

The determination of state law by a federal court is one of the most delicate and recurring problems in our system of federalism. In essence, the federal judiciary is required to put itself in the shoes of the state courts and predict how those courts would resolve often difficult and unsettled issues of state law. See 1A MOORE'S FEDERAL PRACTICE ¶ 0.307[3] at 3101 (2d ed. 1990). Because, however, the federal decision is in no way binding on the state courts, substantial disruption, uncertainty, and unfairness can occur if the federal ruling is ultimately rejected by the state courts. These problems are especially acute for federal courts of appeals, which, in comparison to the district courts, generally are less familiar with and experienced in state law.

In light of these concerns, this Court has made clear that federal courts are to engage in a searching inquiry using all available means to discern state law, and it has established several basic principles to guide that task. Among these are the requirements (1) that the court carefully scrutinize all relevant sources of state law, including intermediate state appellate court decisions and dicta as well as holdings; (2) that the court of appeals defer to the district court's interpretation of the law of the state where the district court sits, since the district court generally is better versed than the appellate court in that law; and (3) that, in the event uncertainty over state law nevertheless remains, the court certify the issue to the state supreme court if a certification procedure is available. As discussed in more detail below, *the court of appeals violated all three of these fundamental federal principles in this case*, thereby misinterpreting both the Michigan choice-of-law rules and the Florida statute of repose.

The vice of the court of appeals' erroneous decision is not just that it violated these settled rules or misapplied the law of two states. In addition, the decision below will encourage plaintiffs who satisfy the requirements of federal diversity jurisdiction to engage in unrestrained forum shopping in order to obtain a favorable ruling on state law in federal court that they could not have obtained in state court. That result is flatly incompatible with the core policies of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and will further strain the resources of an already overburdened federal court system.

The present case is a paradigmatic example of this problem. Respondent initially filed suit against Ford in Michigan state court, but the action was dismissed on *forum non conveniens* grounds. Respondent then sued in state court in Florida, but she immediately withdrew her case when Ford pointed out that it was barred by Florida's

statute of repose. Thus, by allowing respondent to proceed in Michigan federal court without the bar of the Florida statute of repose, the court of appeals has enabled her (1) to sue in federal court in a state in which she could not litigate in the state court and, (2) more importantly, to bring a cause of action that would be precluded in the courts of Florida—the State that by far has the predominant contacts with the case—and that the Florida state court plainly would have dismissed if respondent had not voluntarily withdrawn her claim against Ford. That outcome flouts the central purpose of the *Erie* doctrine.

In previous cases, the Court has granted plenary review to ensure obedience to the controlling principles of *Erie*, including the proper use of state certification procedures. See, *e.g.*, *Exxon Co., U.S.A.* v. *Banque de Paris et des Pays-Bas*, cert. granted, 485 U.S. 1020, vacated and remanded, 109 S. Ct. 299 (1988); *Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974). In other instances, the error has been sufficiently clear that the Court acted summarily to preserve the integrity of *Erie*. See, *e.g.*, *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3 (1975) (per curiam); *Gibson* v. *Phillips Petroleum Co.*, 352 U.S. 874 (1956). And the Court currently has pending before it the question whether a court of appeals should give deference to the district court's interpretation of forum state law. See *Salve Regina College* v. *Russell*, cert. granted, 58 U.S.L.W. 3834 (June 28, 1990) (No. 89-1629).[2]

In the present case, the court of appeals' decision is so plainly and egregiously wrong that it should not be allowed to stand, and summary reversal is justified. Alternatively, the Court may wish to hold the petition pending decision in *Salve Regina College*.

---

[2] Because of the relation between *Salve Regina College* and the present case, Ford has filed a brief as *amicus curiae* in *Salve Regina College*.

I. THE COURT OF APPEALS PLAINLY VIOLATED THE FUNDAMENTAL PRINCIPLES ESTABLISHED BY THIS COURT FOR DETERMINING STATE LAW UNDER *ERIE*

A. The Court Of Appeals Ignored Controlling State-Court Decisions

This Court's decision in *Erie* settled that federal courts must follow state substantive law in cases in which state law is the source of the cause of action.[3] The *Erie* principle "expresse[s] a policy that touches vitally the proper distribution of judicial power between State and federal courts" that is "so important to our federalism." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109-110 (1945). Its purpose is to ensure that the state and federal courts in a state apply the same substantive law irrespective of the happenstance of federal jurisdiction, thereby discouraging forum shopping and avoiding unfair discrimination between state and federal litigants. See *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965) ("the twin aims of the *Erie* rule * * * [are] discouragement of forum-shopping and avoidance of inequitable administration of the laws"). "The *Erie* rule remains a vital expression of the federal system and the concomitant integrity of the separate States." *Ferens* v. *John Deere Co.*, 110 S. Ct. 1274, 1280 (1990).

Erie "placed on [the federal courts] a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern." *Meredith* v. *Winter Haven*, 320 U.S. 228, 237

---

[3] Although that principle has its most frequent application in diversity cases, it is equally applicable in any case in which state law provides the rule of decision regardless of the basis of federal jurisdiction. See *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967); 19 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4507 at 80-81, § 4515 at 275-277 (1982).

(1943). The decision below woefully fails to meet this "great[ ] responsibility." In fact, the court of appeals seriously misconstrued the law of *two* states: Michigan law on choice-of-law rules, and Florida law on the statute of repose. These errors result from the court's disregard of the fundamental principles established by this Court to guide a federal court's determination of state law.

First, the decision of an intermediate state appellate court " 'is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.' " *Hicks* v. *Feiock*, 485 U.S. 624, 630 n.3 (1988), quoting *West* v. *A. T. & T. Co.*, 311 U.S. 223, 237-238 (1940). Thus, it is

> the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law *even though it has not been expounded by the highest court of the State.* An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, *in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.*

Fidelity Trust Co. v. *Field*, 311 U.S. 169, 177-178 (1940) (citation omitted; emphasis added).[4] Second, a federal court, in discharging its "duty * * * to ascertain from all the available data what the state law is" (*West*, 311 U.S. at 237), is obligated to give effect to the considered

---

[4] See also, *e.g.*, *California* v. *Taylor*, 353 U.S. 553, 556 n.1 (1957); *King* v. *United Commercial Travelers*, 333 U.S. 153, 158 (1948) ("federal courts are bound by decisions of a state's intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise"); *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464, 467 (1940) ("federal courts * * * must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently").

statements of the state courts regardless of whether those statements are technically holdings or dicta. See, *e.g.*, *Nolan* v. *Transocean Air Lines*, 365 U.S. 293, 295-296 (1961); *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 204, 205 (1956); *Six Companies* v. *Highway Dist.*, 311 U.S. 180, 187-188 (1940); *Hawks* v. *Hamill*, 288 U.S. 52, 58-60 (1933); 19 Wright, Miller, & Cooper, *supra*, § 4507 at 97-98; 1A MOORE'S FEDERAL PRACTICE ¶ 0.307[2] at 3094 (2d ed. 1990).

The court of appeals breached both of these basic rules. To begin with, it declined to follow the Michigan Court of Appeals' decision in *Hampshire* v. *Ford Motor Co.*, 399 N.W.2d 36 (Mich. App. 1986), lv. denied, 428 Mich. 852 (1987), which the district court had found "presented virtually an identical set of facts" and was "controlling." App., *infra*, 14a, 15a. *Hampshire*, like this case, was a product liability suit arising out of an automobile accident. The accident occurred in California, both plaintiff and the driver of the other vehicle resided in California, and the allegedly defective vehicle was registered in California (399 N.W.2d at 37, 38); the only connections to Michigan were that "Ford's headquarters are located in Michigan and the action was filed in this state." *Id.* at 38. Moreover, California law was more favorable to the Michigan defendant (and less favorable to the California plaintiff) than Michigan law. On these facts, the state trial court held that California rather than Michigan law applied, and the Michigan Court of Appeals affirmed, holding that "a superior foreign state [California] interest exists which calls for the application of foreign law in order to reach a just resolution of the controversy." *Ibid.*

Hampshire is on all fours with the present case and compels the conclusion that, under Michigan choice-of-law rules, Florida's statute of repose applies here. The Sixth Circuit did not disagree with the district court's assess-

ment of *Hampshire* or even attempt to distinguish the decision on its facts. It simply refused to follow that intermediate state appellate court decision.

The Sixth Circuit had no basis for concluding that *Hampshire* no longer represented the law of Michigan. To the contrary, the Michigan Supreme Court in *Olmstead* v. *Anderson*, 400 N.W.2d 292 (Mich. 1987), expressly endorsed *Hampshire*, referring to it and similar decisions as representative of "the majority of cases, as well as the trend." 400 N.W.2d at 301; see also *id.* at 302 ("[t]he interest-weighing cases [citing *Hampshire* and other decisions] are greater in number, as well as more recent"). What is more, *Hampshire* itself relied (399 N.W.2d at 38) on the Michigan Court of Appeals' decision in *Olmstead*, which the Michigan Supreme Court later affirmed. And the Michigan Supreme Court considered whether to grant leave to appeal in *Hampshire* while *Olmstead* was pending before it, and denied leave less than two weeks before the decision in *Olmstead* was rendered. It is hardly surprising, therefore, that decisions subsequent to *Olmstead* have treated *Hampshire* as good law on Michigan choice-of-law rules.[5] Indeed, *no* Michigan case has even questioned the continued vitality of *Hampshire* after *Olmstead*.

---

[5] See *Erickson* v. *American Motors Corp.*, 683 F. Supp. 644, 649 (E.D. Mich. 1988) (under *Olmstead* and *Hampshire*, Florida rather than Michigan law governed when the plaintiff and his decedent were Florida residents and the accident occurred in Florida); *Penwest Development Corp.* v. *Dow Chemical Co.*, 667 F. Supp. 436, 442-443 (E.D. Mich. 1987) (under *Olmstead* and *Hampshire*, Canadian rather than Michigan law applied when the plaintiff resided and the accident occurred in Canada; "the plaintiff's residence is a paramount consideration in determining which state's law to apply in a tort case" and, "[w]hen the defendant is a Michigan resident and the plaintiff is not, Michigan law generally will not be applied, especially if Michigan is not the place of the wrong"); compare *Bonelli* v. *Volkswagen of America, Inc.*, 421 N.W.2d 213, 225 n.6 (Mich. App.) ("Michigan tort law controlled * * * since Michigan was the site of the alleged injury and of plaintiff's residence"), lv. denied, 430 Mich. 896 (1988).

In these circumstances, the Sixth Circuit doubly erred under *Erie* by (1) deviating from the Michigan Court of Appeals' decision in *Hampshire* without any basis in Michigan law for doing so, and (2) disregarding the Michigan Supreme Court's approval of *Hampshire* in *Olmstead* (as well as the other decisions that have followed *Hampshire* after *Olmstead*). "If the present suit had been brought in [Michigan state] court no reason is advanced for supposing that the [Michigan Court of Appeals] would depart from its previous ruling or that the Supreme Court of the state would grant the review which it withheld before." *West*, 311 U.S. at 238.

The sole rationale offered by the Sixth Circuit for departing from *Hampshire* was that Florida had "no interest" in applying its statute of repose to out-of-state manufacturers (App., *infra*, 11a), and therefore that it was unnecessary to "make a comparative analysis of the interests of Michigan and the foreign state as was done in *Hampshire*." *Id.* at 9a. Here again, however, the Sixth Circuit disregarded this Court's *Erie* rulings that require obedience to state-court decisions on the meaning of state law. Numerous decisions of the Florida courts, including those of the Florida Supreme Court, have applied the statute of repose to out-of-state manufacturers in general and Ford in particular. Under *Erie*, the Sixth Circuit was not at liberty simply to ignore, as it did, this consistent line of Florida decisions settling the state-law issue.

The Florida courts repeatedly have applied the Florida statute of repose to out-of-state manufacturers doing business in the State. In 1987 and 1988 alone (the two years preceding briefing and argument in the Sixth Circuit), the Florida Supreme Court applied the Florida statute of repose in at least *seven* cases to bar actions against corporations that (according to MOODY'S INDUSTRIAL MANUAL)

were neither incorporated nor headquartered in Florida.[6] In addition, a number of courts in Florida, both state and federal, have applied the Florida statute of repose *specifically to actions against Ford.*[7] Thus, until this case, there never has been the slightest doubt under Florida law that the Florida statute of repose extends to in-state and out-of-state manufacturers alike. The Sixth Circuit's contrary interpretation cannot be squared with this unbroken string of decisions.

In refusing to follow these Florida decisions on Florida law, the court of appeals did not suggest that the language of the Florida statute of repose (App., *infra*, 22a) applied only to Florida manufacturers and excluded out-of-state manufacturers doing business in Florida. Nor did the court of appeals refer to any legislative history supporting its unprecedented and unnatural interpretation of the statute. On the contrary, it expressly disavowed any such support, correctly noting that the legislative history was "scarce." *Id.* at 10a.

Instead of relying on the usual authoritative sources of Florida law—state precedent, the text of the statute of repose, and relevant legislative history—the court of

---

[6] *Diaz* v. *Curtiss-Wright Corp.*, 519 So. 2d 610 (Fla. 1988); *Shaw* v. *General Motors Corp.*, 518 So. 2d 900 (Fla. 1987); *Brockenridge* v. *Ametek, Inc.*, 517 So. 2d 667 (Fla. 1987), app. dismissed & cert. denied, 109 S. Ct. 30 (1988); *Pait* v. *Ford Motor Co.*, 515 So. 2d 1278 (Fla. 1987); *Wallis* v. *Grumman Corp.*, 515 So. 2d 1276 (Fla. 1987); *Purty* v. *McDonnell Douglas Corp.*, 515 So. 2d 983 (Fla. 1987); *Keyes* v. *Fulton Mfg. Corp.*, 515 So. 2d 979 (Fla. 1987).

[7] *Pait* v. *Ford Motor Co.*, 515 So. 2d 1278 (Fla. 1987); *Perez* v. *Ford Motor Co.*, 508 So. 2d 1339 (Fla. App. 1987), review denied, 520 So. 2d 585 (Fla. 1988); *Cassidy* v. *Firestone Tire & Rubber Co.*, 495 So. 2d 801 (Fla. App. 1986), review denied, 506 So. 2d 1040 (Fla.), app. dismissed & cert. denied, 484 U.S. 802 (1987); *Griffin* v. *Ford Motor Co.*, No. TA 85-7244-WS (N.D. Fla. 1986), aff'd sub nom. *Eddings* v. *Volkswagenwerk, A.G.*, 835 F.2d 1369 (11th Cir.), cert. denied, 109 S. Ct. 68 (1988).

appeals relied *entirely* on a more dubious authority: a student law review note that in fact does not even arguably support the court's conclusion. App., *infra*, 10a, citing Note, *Products Liability Statute of Repose—A Florida Perspective*, 11 NOVA L. REV. 849 (1987). At the page cited by the court, the note simply observes that:

> Although legislative history is scarce concerning Florida's enactment of the products liability statute of repose, *manufacturers'* expanded liability appears to be the primary influence in its enactment. Florida, as well as the rest of the country, experienced a "products liability revolution" in the past two decades.

Id. at 852 (emphasis added). Not a word of that explanation confines the statute to Florida manufacturers; the student author refers without limitation to "manufacturers." Indeed, on the very next page, the note explains the policies of the statute in terms that are equally applicable to out-of-state manufacturers doing business in Florida:

> A perceived liability "crisis" in the 1970's appears to have also given credence to the idea of a statute of repose. Because courts permitted a greater number of claims to be brought against manufacturers, as well as frequent and large recoveries, products liability litigation increased nationwide. Authorities claimed that the increased litigation led to unaffordable insurance rates and, in some instances, unobtainable coverage at any price. In response, legislative proposals advocated the enactment of statutes of repose to remedy the insurance market.

Id. at 853. What is more, the principal focus of the note is a case that *applied* the Florida statute of repose to an *out-of-state* automobile manufacturer. See *Lamb* v. *Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144 (S.D. Fla. 1986), aff'd sub nom. *Eddings* v. *Volkswagenwerk*,

A.G., 835 F.2d 1369 (11th Cir.), cert. denied, 109 S. Ct. 68 (1988).[8]

In sum, the Sixth Circuit flatly disregarded this Court's precedents under *Erie*, leading to an interpretation of both Michigan and Florida law that is irreconcilable with controlling authority in those states. As a consequence, "a suit by a non-resident litigant in [Michigan] federal court instead of in a State court a block away [will] lead to a substantially different result." *Guaranty Trust*, 326 U.S. at 109. This palpable departure from "[t]he nub of the policy that underlies *Erie*" (*ibid.*) calls for correction by this Court.

B. The Court Of Appeals Failed To Accord Due Deference To The District Court's Determination Of State Law

As demonstrated above, the district court correctly applied Michigan choice-of-law rules. To the extent, however, that there may have been room for reasonable doubt, the

[8] Of course, if the Florida statute were construed, as the Sixth Circuit did, to discriminate on its face against out-of-state manufacturers by limiting its protection to in-state companies, it would violate the Commerce Clause and the Equal Protection Clause. See, *e.g.*, *Bendix Autolite Corp.* v. *Midwesco Enterprises*, 486 U.S. 888 (1988); *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985); *Juzwin* v. *Asbestos Corp., Ltd.*, 900 F.2d 686 (3d Cir. 1990), petition for cert. pending, 59 U.S.L.W. 3074 (filed July 10, 1990) (No. 90-76); *Abramson* v. *Brownstein*, 897 F.2d 389 (9th Cir. 1990). Since Florida courts, like the federal courts, construe a statute "[w]henever possible * * * not to conflict with the constitution" (*Firestone* v. *News-Press Pub. Co.*, 538 So. 2d 457, 459 (Fla. 1989)) and "avoid declaring a statute unconstitutional if such statute can be fairly construed in a constitutional manner" (*Sandlin* v. *Criminal Justice Standards & Training Comm'n*, 531 So. 2d 1344, 1346 (Fla. 1988)), the Sixth Circuit plainly departed from established principles by construing the Florida statute of repose to raise rather than to avoid constitutional issues.

appellate court should have deferred to the district court's interpretation of Michigan law. By failing to do so, the court of appeals committed a second fundamental error of federal law.

As Ford demonstrates in greater detail in its brief as *amicus curiae* in *Salve Regina College* v. *Russell*, there are two principal reasons why courts of appeals should defer to the district court's construction of the law of the state in which it sits. First, as a practical matter, district judges are more likely to be familiar with state law and thus better able to discern and apply that law. Frequently a district judge has been a leading practitioner in his or her state or a state-court judge before appointment to the federal bench;[9] court of appeals judges, by contrast, are chosen from the many states within the circuit and therefore are less likely to be experienced in the law of the state at issue in any particular case. Likewise, given the nature and volume of their dockets, district judges normally are confronted with a larger number and a wider range of issues under state law than is true for appellate judges. Accordingly, deference to the district court's determination of state law will serve to promote informed application of forum state law as mandated by *Erie*.

Such deference also will promote federal judicial economy. A federal-court determination of unsettled state law, while of considerable practical importance for an interim period, is not binding on the state courts and can be rejected as incorrect by even the lowest court in the state.

---

[9] In this case, District Judge La Plata previously had served as a Michigan state trial judge for six years and had spent more than 20 years as a trial lawyer in private practice in Michigan. In addition, he attended both college and law school in Michigan and was a professor at the Detroit College of Law. See 1 ALMANAC OF THE FEDERAL JUDICIARY (Prentice Hall Law & Business 1990).

For that reason, it is highly inefficient for increasingly burdened appellate courts to devote the substantial resources necessary to render *de novo* interpretations of often unfamiliar state law. What the American Law Institute pointed out with respect to diversity jurisdiction in general is equally applicable to *de novo* appellate review of state law:

> From the point of view of the federal courts, the task of deciding such cases under state law imposes especially laborious burdens, often greater in fact than involved in resolving issues of federal law on which those courts may speak with their own authority. And although they may occasionally contribute to the development of state law, those heavy labors are essentially wasteful. Lacking the status of authorized precedent and avowedly aiming to project state court decisions, they go for the most part only to the adjudication of the particular dispute between the actual parties.

American Law Institute, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 99-100 (1968). Unless the district court demonstrably has erred in interpreting state law, therefore, its decision should not be overturned by the court of appeals.

This Court has recognized that deference is due a district court's determination of its own state law. In *United States* v. *Hohri*, 482 U.S. 64, 74 n.6 (1987), the Court recently noted that federal cases involving state-law issues "are tried before local federal district judges, who are likely to be familiar with the applicable state law. *Indeed, a district judge's determination of a state-law question usually is reviewed with great deference*" (emphasis added). See also, *e.g.*, *Bernhardt* v. *Polygraphic Co.*, 350 U.S. at 204 ("[s]ince the federal judge making those findings [of Vermont law] is from the Vermont bar, we give special weight to his statement of what the Vermont law is");

Gardner v. *New Jersey*, 329 U.S. 565, 575 (1947) ("[t]hat construction of New Jersey law made by a federal judge of the New Jersey District Court is entitled to special weight"). In the present case, however, the Sixth Circuit inexplicably gave *no* deference whatsoever to the district court's application of Michigan choice-of-law rules and simply substituted its judgment for that of the district court.

In *Salve Regina College* v. *Russell*, this Court granted review of the question "[w]hether a party is entitled to *de novo* review of a federal district judge's determination of state law in a case in which federal jurisdiction is founded upon diversity of citizenship." The same question is presented in this case, and review should be granted here as well. Alternatively, the Court may wish to hold this petition pending its decision in *Salve Regina College* and then dispose of the petition as appropriate in light of that ruling.

C. The Court of Appeals Failed To Follow Available State Certification Procedures

Insofar as the court of appeals entertained substantial doubts about the correctness of the district court's ruling notwithstanding the state decisions supporting it and the deference it was due, the appropriate course was not to reverse the district court but rather to certify the dispositive state-law questions to the Michigan and Florida Supreme Courts. The Sixth Circuit's refusal to do so constitutes another important error that warrants this Court's review.

Both Michigan and Florida have provided procedures for certification to their state supreme courts. See Mich. Ct. R. 7.305(B) (West Supp. 1989), and Fla. R. App. P. 9.030(a)(2)(C), 9.150(a) (West 1983) (App., *infra*, 22a-23a).

A certification procedure offers an efficient means of obtaining a definitive resolution of state law—something that only the highest court of the state, not a federal court of appeals, can provide.

This Court has recognized the advantages of state-law certification procedures and encouraged their use in a variety of circumstances. In *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974), the Court explained that certification "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism," and that it is "particularly appropriate" for state-law questions that are "novel[ ]" and "unsettle[d]." The Court later elaborated upon the important federalism and efficiency considerations that underlie certification:

> In a federal system, it is obviously desirable that questions of law which * * * are both intensely local and immensely important * * * be decided in the first instance by state courts. This may not always be possible nor is it always required, but where as here there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it.

Elkins v. *Moreno*, 435 U.S. 647, 663 n.16 (1978) (*sua sponte* certification by this Court).[10] See also 17A Wright, Miller, & Cooper, *supra*, § 4246 at 113, § 4248 at 164-165.

Lower courts have agreed that certification is a salutary procedure for resolving significant and undecided state-

---

[10] See also, *e.g.*, *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988) (Supreme Court ordered certification to state supreme court); *Zant* v. *Stephens*, 456 U.S. 410 (1982) (same); *Mills* v. *Rogers*, 457 U.S. 291, 305-306 (1982) (vacating court of appeals' decision and remanding for consideration of certification); *Massachusetts* v. *Feeney*, 429 U.S. 66 (1976) (*sua sponte* certification); *Bellotti* v. *Baird*, 428 U.S. 132 (1976) (remanding with instructions to certify); *Aldrich* v. *Aldrich*, 375 U.S. 249 (1963) (*sua sponte* certification); *Clay* v. *Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960) (vacating and remanding for certification).

law questions. As Judge John R. Brown, one of the leading proponents of certification, wrote for the Eleventh Circuit: "[R]ather than risk pronouncing a result which [the state supreme] court might ultimately elect not to follow, we follow the course—often pursued by this * * * court, with enthusiastic support of the U.S. Supreme Court—of certifying the significant issues to the Supreme Court of Florida for an authoritative answer." *Ageloff* v. *Delta Airlines Inc.*, 860 F.2d 379, 388-389 (11th Cir. 1988). Certification is a "potentially enormously helpful procedure under which * * * unresolved and important questions of state law may be referred to the court best equipped to provide answers to them." *Jones* v. *Heckler*, 754 F.2d 519, 520 (4th Cir. 1985). Thus, "the certification procedure is a valuable device for securing prompt and authoritative resolution of unsettled questions of state law." *Kidney* v. *Kolmar Laboratories, Inc.*, 808 F.2d 955, 957 (2d Cir. 1987). By invoking certification, " 'both federal and state judicial systems are the beneficiaries of a procedure rooted in cooperative federalism.' * * * [Certification is supported by] our *Erie* duty * * * [and] principles of federalism." *Boardman* v. *United Services Auto. Ass'n*, 742 F.2d 847, 848 n.1, 851 (5th Cir. 1984) (citation omitted), cert. denied, 474 U.S. 980 (1985).

For these reasons, the "use [of certification] should be encouraged." R. Stern, APPELLATE PRACTICE IN THE UNITED STATES 172 (2d ed. 1989). "*Lehman* is a clear direction to the courts of appeals to look favorably on the use of certification procedures in diversity cases which present difficult issues of state law." 1A MOORE'S FEDERAL PRACTICE ¶ 0.203[5] at 2159 (2d ed. 1990). See also C. Wright, THE LAW OF FEDERAL COURTS 313 (4th ed. 1983) ("[t]he certification procedure has been regarded with quite an extraordinary enthusiasm by the commentators"); P. Bator, *et al.*, HART AND WECHSLER'S THE FEDERAL COURTS AND

THE FEDERAL SYSTEM 1382 (3d ed. 1988) ("[t]he majority of commentators have been enthusiastic about certification"); Note, *Erie R.R. and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures*, 18 HOFSTRA L. REV. 421, 434 (1989) ("[w]hen a court fails to avail itself of the process of certification, the resulting burden may include unsettled areas of law, inconsistent holdings [by state and federal courts] and a return to the pre-*Erie* days of forum-shopping"). The decision below is conspicuously out-of-step with the prevailing trend favoring a liberal utilization of state certification procedures.[11]

In this case, the court of appeals failed to certify the state-law issues to either the Michigan or the Florida Supreme Court. Before reversing the district court's considered decision, the court of appeals on its own motion should have certified any unresolved issues of state law to the appropriate state supreme court. See *Lehman Brothers*, 416 U.S. at 390-391. In fact, respondent moved for certification, which the court of appeals denied. App.,

---

[11] The practical advantages of certification have been confirmed by a study prepared by the Federal Judicial Center. See C. Seron, CERTIFYING QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES (Federal Judicial Center 1983). As the report summarizes (at v), "most judges suggested that the disadvantage of possible delay is outweighed by the procedure's advantages, specifically that an accurate answer from the appropriate tribunal avoids further litigation and that relations between state and federal courts are improved." The study also concludes that certification is reasonably expeditious, with a median time to obtain the state-court answer of six months (*id.* at 15)—a period that "must be set off against the time that would be required for the federal court to research and reach its own answer to the question certified to the state court." *Id.* at 16. And certification actually may result "in some economies of time. * * * [T]he delay attending certification is more than compensated by subsequent expedition of other cases involving the same or related questions of state law." *Id.* at 17.

infra, 19a.[12] Furthermore, once the court of appeals disagreed with the district court's decision, thus indicating that state law was not as clear as Ford (and the district court) had believed, Ford filed a petition for rehearing and for certification of state-law issues; although the court denied the petition for rehearing, it simply ignored the request for certification. *Id.* at 20a-21a.

In these circumstances, review by this Court is warranted. The Court has never established guidelines to govern federal courts' use of state-law certification procedures and, as this case compellingly demonstrates, the Court's guidance is urgently needed. The availability of certification has grown enormously in recent years; at least 38 states have now adopted certification procedures, and a uniform state law has been promulgated (which has been enacted in 26 states). See Stern, *supra*, at 171-172 & nn.80-82; see also 17A Wright, Miller, & Cooper, *supra*, § 4248 at 164, 167 & n.30. Certification represents an effective and efficient means for implementing the policies of *Erie* and ensuring that the decisions of the lower federal courts accord with applicable state law. This Court's review is thus essential to enable state certification procedures to achieve their full benefits for cooperative federalism, informed decisionmaking, and judicial efficiency. As an alternative to plenary review, the Court may wish to vacate and remand the case to the court of appeals to have it certify the state-law issues to the state supreme court. See cases cited at page 21 & note 10, *supra*.

---

[12] At the time, Ford opposed respondent's motion for certification on the ground that the district court's ruling clearly was correct in light of *Hampshire* and should be affirmed. However, given the subsequent disagreement between the Sixth Circuit and the district court over state law, certification became proper in the court of appeals and, as explained in the text, Ford promptly so moved. See *Lehman Brothers*, 416 U.S. at 392-393 (Rehnquist, J., concurring) (losing party in court of appeals first sought certification at rehearing stage).

II. THE COURT OF APPEALS' EGREGIOUS DISREGARD OF THIS COURT'S DIRECTIVES FOR DETERMINING STATE LAW UNDER *ERIE* WARRANTS REVIEW

For the reasons discussed above, the court of appeals' approach to the state-law issues in this important tort case is not even arguably correct under *Erie*. The Sixth Circuit flouted all three principles established by this Court for determining state law in diversity actions: it refused to follow state-law decisions directly on point; it refused to give any deference to the district court's interpretation of state law; and it refused to certify the controlling issues of state law to the state supreme court. Not surprisingly, the court of appeals thereby fell into manifest error in interpreting the law of two states.

The court of appeals' decision unquestionably is of considerable practical importance. To begin with, diversity actions are a staple of federal litigation and require the federal courts regularly to ascertain state law that is complex and uncertain. The most recently published statistics show that diversity cases have accounted for more than 25% of the docket of the federal district courts and approximately 15% of that of the courts of appeals; indeed, the number of diversity cases filed in the district courts nearly doubled between 1979 and 1988. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 8-9 & Table 4, 145-146 Table 8-1A (1988). Thus, the way in which federal courts determine issues of state law under *Erie* has an enormous impact on the federal judicial system.[13] It is imperative that

---

[13] Moreover, diversity cases put a disproportionate strain on the resources of the federal judicial system. As the Federal Courts Study Committee recently reported:

> The problem is not merely that diversity cases misuse federal judicial resources. It is that they misuse a lot of federal judicial

(Footnote continued on following page)

the *Erie* rules not only be clear in theory but scrupulously observed in practice.

The application of *Erie* principles to state statutes of repose is itself a significant and recurring problem. Statutes of repose are a common and critically important feature of state legal systems. The most recent survey of the area found that 48 states had enacted a total of 98 product liability statutes of repose. See McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 580 (1981). Our research indicates that the situation is little different today.

Moreover, the court of appeals' erroneous decision is not confined to statutes of repose. On the contrary, the court's analysis would "presum[e]" (App., *infra*, 10a) that any foreign state statute that does not expressly apply to out-of-state companies is limited to in-state businesses. For example, Florida recently adopted tort reform legislation that limits defendants' liability in various respects. See Fla. Stat. Ann. §§ 768.73 *et seq.* (West Supp. 1990). This legislation, like the Florida statute of repose at issue here, is silent on the scope of its application and does not expressly include or exclude non-Florida companies. Under

---

[13] *continued*

> resources. * * * And the volume of filings understates diversity jurisdiction's impact. Diversity cases account for about half the civil trials in federal court, and they frequently generate complex procedural and jurisdictional problems, making them more time-consuming and expensive to process than similar claims in the state courts.
>
> * * * * * *
>
> Diversity is a source of friction between state and federal courts * * *.

REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 39-41 (1990). The burdens of diversity cases are particularly significant for the courts of appeals, which, as the Federal Courts Study Committee found (at 10, 110), have "[t]he most accute problems of overload" and are facing a "crisis of volume" that "is beyond dispute."

the court of appeals' reasoning, Ford and all other corporations incorporated or headquartered outside Florida would be denied the protections of this tort reform legislation if they are sued in Michigan federal district court under diversity—even though, as in this case, the accident occurred in Florida and the plaintiff is a Florida resident.

The Sixth Circuit's interpretation of Michigan choice-of-law rules for tort cases is a matter of particular practical concern. Ford, General Motors, and Chrysler, as well as other large corporations with headquarters in Michigan, are involved in thousands of cases growing out of accidents that occur across the country. Because these companies are amenable to suit in Michigan, the court of appeals' decision means that non-Michigan plaintiffs can routinely bring their claims in Michigan federal court, thereby avoiding whatever limitations have been imposed on such claims by the state where they reside and where the accident happened.[14] Indeed, within a week of the court of appeals' decision in this case, a plaintiffs' lawyer in Miami commented that the ruling "alerts the victims of car accidents in the other 49 states, where liability claims may be limited by law, that they can now sue the manufacturer" in federal court in Michigan. Palm Beach Review, Apr. 16, 1990, at 1, col. 1.

---

[14] As respondent acknowledged in her motion for certification in the court of appeals (at 6-7):

> The conflict of laws issue presented in the present case is a very important one, and one that may be expected to arise with some frequency as out-of-state Plaintiffs bring products liability suits against Michigan manufacturers in federal courts in Michigan. * * * Such suits may always be brought in a federal court in Michigan on the basis of diversity of citizenship. * * * [T]he federal courts in Michigan would be well-served by a definitive decision by the Supreme Court of Michigan, resolving the question of whether in such a case, Michigan's product liability law will be displaced in favor of the manufacturer-protecting law of the state where the accident occurred.

Accordingly, the court of appeals' decision has severe adverse consequences for both the federal district courts and manufacturers within the Sixth Circuit. The decision below is a license for plaintiffs around the country to circumvent the statute of repose or other tort reform legislation that is applicable in the state with the predominant interest in the case. The result will be a substantial and unwarranted burden on the federal courts and opens the door to widespread nullification of state law and policy. This disturbing development is squarely inconsistent with fundamental principles of federalism and plainly merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted, and (1) the judgment below should be summarily reversed, (2) the judgment below should be vacated and the case remanded to the court of appeals for certification of the state-law issues, or (3) the case should be set for briefing and oral argument. In the alternative, the Court may wish to hold the petition pending decision in *Salve Regina College* v. *Russell*, No. 89-1629.

Respectfully submitted.

ARTHUR R. MILLER
Langdell Hall
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4111

JOHN M. THOMAS
Ford Motor Company
One Parklane Boulevard
Suite 300, Parklane Towers West
Dearborn, Michigan 48126
(313) 322-6743

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
MARK I. LEVY
JAMES C. SCHROEDER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioners

SEPTEMBER 1990

APPENDICES

APPENDIX A

No. 88-2137

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTINE MAHNE,	)	
	)	
Plaintiff-Appellant,	)	ON APPEAL from the
	)	United States District
v.	)	Court for the Eastern
	)	District of Michigan.
FORD MOTOR COMPANY;	)	
DONALD PETERSEN; and	)	
HAROLD MacDONALD,	)	
	)	
Defendants-Appellees.	)	

Decided and Filed April 9, 1990

Before: NELSON and RYAN, Circuit Judges; and MEREDITH, District Judge.*

RYAN, Circuit Judge. This case presents a choice of law problem well-suited for a law school civil procedure examination. It requires us to decide whether Michigan or Florida law governs the plaintiff's product liability action. We conclude that Michigan law controls and, therefore, reverse the judgment of the district court.

* The Honorable Ronald E. Meredith, United States District Judge for the Western District of Kentucky, sitting by designation.

I.

On April 16, 1985, Marlo Mahne, a Florida resident, was a passenger in a 1967 Ford Mustang that was rear-ended by another vehicle and burst into flames. The accident occurred in Florida. As a result of the accident, Miss Mahne, then 15 years old, was severely burned. Her mother and next friend, Christine Mahne, brought a products liability action against defendant Ford Motor Company in a Michigan state court. Defendant's headquarters and principal place of business are located in Michigan and the design, testing, and manufacture of the 1967 Ford Mustang occurred there. The Michigan lawsuit was dismissed on *forum non conveniens* grounds, following which plaintiff brought suit in a Florida state court. She voluntarily dismissed that action when defendants argued that the suit was foreclosed by the Florida statute of repose which bars product liability actions brought twelve years after the date of delivery of the completed product to its original purchaser. Fla. Stat. § 95.031(2) (1985) (amended 1986).[1]

Plaintiff then brought the present action against Ford and two of its officers in the District Court for the Eastern District of Michigan, pursuant to the court's diversity jurisdiction. 28 U.S.C. § 1332. Plaintiff alleged that defendants breached an implied warranty of fitness and negligently designed, manufactured, and tested the vehicle's fuel system and rear-end structure. Defendants filed a motion to dismiss, maintaining that the law of Florida, the place of the accident, controlled, and that Florida's statute

[1] Florida's statute of repose was amended effective October 1, 1986. The amendment abolished the period of repose in product liability actions. The amendment was not made retroactive. *Melendez v. Dreis & Krump Mfg. Co.*, 515 So.2d 735 (1987).

of repose barred plaintiff's suit. Plaintiff responded that Michigan, not Florida, law governed the question of the timeliness of the lawsuit in the federal court. The district court, relying upon *Hampshire v. Ford Motor Co.*, 155 Mich. App. 143, 399 N.W.2d 36 (1986), *lv. denied*, 428 Mich. 852 (1987), determined that Florida law was controlling and that its statute of repose, as substantive law, barred plaintiff's products liability action.[2] This appeal followed.

The sole issue before us is whether Michigan's choice-of-law rules would require that Florida's statute of repose be applied in favor of a Michigan manufacturer, thus barring plaintiff's products liability claim.

II.

It is elemental that when jurisdiction is based on diversity of citizenship, a federal court must apply the choice-of-law rules of the state in which it sits. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Since plaintiff's action was brought in the United States District Court for the Eastern District of Michigan, Michigan choice-of-law rules apply.

Prior to 1982, Michigan courts, in deciding choice-of-law issues, applied the substantive law of the jurisdiction

[2] The district court also held that even if Florida's statute of repose was considered procedural law, Michigan's borrowing statute, M.C.L. § 600.5861, would require that Florida's statute of repose be applied. Since both parties on appeal agree that the statute of repose is substantive law and the *Olmstead* analysis controls, we do not address the troublesome questions whether the Florida statute of repose is a statute of limitations for purposes of Michigan's borrowing statute or whether under Michigan's borrowing statute a cause of action can accrue in a state, such as Florida, where the suit would be barred.

where the wrong occurred, the so-called *lex loci delicti* rule. *Abendschein v. Farrell*, 382 Mich. 510, 170 N.W.2d 137 (1969). However, in *Sexton v. Ryder Truck Rental, Inc.*, 413 Mich. 406, 320 N.W.2d 843 (1982), a majority of the court, speaking through multiple opinions, was critical of the rigidities of *lex loci* and abandoned it as an absolute rule.[3] *Sexton, supra*, at 433. Unfortunately, the Michigan court, having jettisoned *lex loci*, declined to adopt any other specific choice-of-law methodology and, instead, left choice-of-law issues to be evaluated on a case-by-case basis. *Id.* at 433. The lead opinion in *Sexton*, signed by three of the seven justices, concluded that *lex fori*, the law of the forum, rather than *lex loci*, the law of the place of the wrong, applied when Michigan residents, or corporations doing business in Michigan, were involved in an accident in another state and appeared as plaintiffs or defendants in a tort action in Michigan courts. 413 Mich. at 439.

A concurring opinion, also signed by three justices, including a justice who had signed the lead opinion, found it insignificant in *Sexton* that the accident had not occurred in Michigan and reasoned that Michigan law should apply since "[t]he status of ownership giving rise to the legal consequence of liability has been regulated in Michigan by [the owners' liability statutes]." 413 Mich. at 440-41.[4]

---

[3] The author was a member of the Michigan Supreme Court when *Sexton* was decided and dissented in the case, finding no reason to abandon the rule of *lex loci delicti* as set forth in *Abendschein v. Farrell*, 382 Mich. 510, 170 N.W.2d 137 (1969). The chief justice concurred in the dissent. *Sexton, supra*, at 443.

[4] The issue in the two consolidated cases in *Sexton* was whether Michigan's motor vehicle and aircraft owners' liability statutes applied and, therefore, imposed liability on the defendant-owners of the vehicles for the negligent acts of the operators.

The justice who concurred in both the lead opinion and the concurring opinion wrote still a third opinion, to which no other justice subscribed, undertaking to explain the lead and concurring opinions, and expressing the view that Michigan courts should apply Michigan law in all personal injury or property damage actions brought in Michigan unless there is a compelling reason to apply the law of a foreign jurisdiction. 413 Mich. at 442. None of the opinions in *Sexton* garnered the signatures of a majority of the seven justices.

Five years later, in *Olmstead v. Anderson*, 428 Mich. 1, 400 N.W.2d 292 (1987), the Michigan Supreme Court, which by then included six justices who were not seated when *Sexton* was decided, attempted to clarify the decision in *Sexton*. *Olmstead* involved a Minnesota plaintiff suing a Michigan defendant for injuries suffered in a Wisconsin automobile accident.

The court noted that *Sexton's* plurality lead opinion had proven difficult for Michigan and federal courts to apply in that some courts construed *Sexton* to hold that *lex fori* only applied to personal injury actions where the parties were residents of Michigan, while other courts understood *Sexton* to require a weighing of the interests of the involved states to determine which state had the greater interest in having its law applied. *Olmstead, supra*, at 22. The *Olmstead* court noted that the interest-weighing approach to determining what law to apply in choice-of-law cases appeared to be the tack taken by a majority of courts that had attempted to apply *Sexton*, and also appeared to reflect "the trend." *Id.*

After formulating a few generalizations from *Sexton*, the *Olmstead* court declared that, consistent with the policy of *Sexton*, *lex fori* rather than *lex loci* is the presump-

tive rule of thumb for choice of law issues in tort cases, but that the issue must be decided on a case-by-case basis. The question to be answered in each case is:

> [W]hether [the] case [at hand] presents a situation in which reason requires that foreign law supersede the law of this state.

Id. at 24.

The *Olmstead* court's answer to that question was as follows:

> [Since] Wisconsin has no interest in seeing its law applied, we see no rational reason to displace Michigan law in this case. Since there is no reason to apply Wisconsin law, it is, therefore unnecessary to undertake an analysis of the interests of Michigan.
>
> . . . .
>
> However, in another case in which the state of injury does have an interest in having its law applied, such an analysis might be necessary and proper.

Id. at 29-30

Unlike the situation in this case, since *Olmstead* involved a non-Michigan plaintiff suing a Michigan defendant for damages suffered in a Wisconsin accident, the *lex loci* jurisdiction was not the place of residence of either party. In this case, to repeat, a Florida resident is suing a Michigan defendant for damages suffered in a Florida accident. However, we are satisfied that those differences do not affect the analysis that must govern our decision whether Florida or Michigan law applies in this case.

III.

It is perhaps worth noting, if indeed elemental, that a federal court in a diversity action is obligated to apply the law it believes the highest court of the state would

apply if it were faced with the issue. *Tennessee River Pulp & Paper Co. v. Eichleay Corp.*, 708 F.2d 1055, 1057 (6th Cir. 1983). We think it is very clear from the lengthy discussion in *Olmstead* that the Michigan Supreme Court would hold, in a suit brought in a Michigan court by a party who is not a citizen of Michigan against a Michigan resident, arising out of an accident that occurred outside of Michigan and in the state of the plaintiff's residence, that Michigan law as the forum law presumptively controls the litigation; and further, that there must be a rational reason to displace Michigan law. To determine whether there is such a rational reason, a court's first duty is to examine the foreign state's interest, if any, in having its law applied. If there is no reason to apply the foreign state's laws, there is no need to undertake an analysis of Michigan's interests. *Olmstead*, 428 Mich. at 30. Only where the foreign state is found to have an interest in having its law applied does an analysis of Michigan's interests become necessary. *Id.* at 30. Absent a finding of some interest on the part of the foreign state, there is no occasion to examine Michigan's interest and the presumption that Michigan applies is controlling.

The *Olmstead* court noted that regardless of whether the foreign law sought to be applied is the law of the state where the wrong occurred or the law of the state of plaintiff's residence, the analysis will be the same. *Id.* at 29 n.12. However, the court failed to mention whether the analysis would be the same if the state of plaintiff's residence is also the state where the wrong occurred, the circumstances of the present case. The point is problematic because the *Olmstead* court distinguished the facts of that case from a number of post-*Sexton* cases brought in Michigan by nonresident plaintiffs whose injuries occurred in states other than where the plaintiffs resided

or had substantial contacts and whose contacts with Michigan "could be described as neither fleeting nor fortuitous." 428 Mich. at 23. In such cases, the court noted, lower courts had usually applied *lex loci delicti*, the place of the wrong, rule. *Id.*

Despite this problem, we believe the court in *Olmstead* intended to set forth a general rule for conflicts-of-law issues. Thus, we presume the Michigan court, if presented with the facts before us, would hold that even where plaintiff's injury occurred in the state where plaintiff resides, the same interest-analysis approach would apply. Therefore, we assume that Michigan law applies unless it appears that Florida has an interest in its law being applied and, if it has, such interest is sufficient that "reason" requires that the Florida statute of repose "displace" the law of the forum. *Olmstead*, 413 Mich. at 24.

As the *Olmstead* court noted, where the defendant is a citizen of Michigan he cannot argue that the application of Michigan law would defeat his expectations. *Id.* at 27. Similarly, where neither party is a citizen of the state where the wrong occurred, that state has no interest in the litigation unless the issue is one involving conduct as opposed to compensation. *Id.* at 29. Moreover, where the statute is designed to protect local interests, there is no reason to extend its benefits to a nonresident whose state has no similar statute. *Id.* at 29.

IV.

The district court, in granting defendants' motion to dismiss, found the pre-*Olmstead* case of *Hampshire v. Ford Motor Co.*, 155 Mich. App. 143, 399 N.W.2d 36 (1986), *lv. denied*, 428 Mich. 852 (1987), controlling, largely because it found the facts presented in *Hampshire* were "virtually identical" to the facts in the instant case.

In *Hampshire*, the plaintiff, a California resident, was seriously injured in California when the car he was driving was struck head-on by a stolen vehicle. The plaintiff brought an action in Michigan against the stolen vehicle's manufacturer, defendant Ford Motor Company, alleging that Ford negligently designed the ignition-locking system because it failed to operate as an anti-theft device. 155 Mich. App. at 145. The *Hampshire* court held that pursuant to *Sexton, supra*, a comparison of each jurisdiction's interests in having its law govern was required. 155 Mich. App. at 146. The court concluded that California's interest was comparatively greater since the plaintiff resided in California, the accident occurred there, the vehicle was registered and licensed in that state, and the sole connections to Michigan were that the defendant's headquarters was there and the action was filed in that state. As a result, the court applied the California substantive law. 155 Mich. App. at 147. The court also noted that the plaintiff did not object to the application of California law at the hearing on the defendant's motion for summary judgment. *Id.*

The plaintiff insists that the Michigan Supreme Court, in *Olmstead*, overruled *Hampshire*. We do not necessarily agree, but we need not address that matter because we are satisfied that, on the facts before us, we need not make a comparative analysis of the interests of Michigan and the foreign state as was done in *Hampshire*.

Under the *Olmstead* formula, the first step is to determine what interest, if any, the foreign state has in having its law applied, and only if Florida has an interest of some kind will Michigan's interest in having its law applied be examined. Moreover, should we reach the comparative interest-analysis step, *Olmstead* requires consideration of more factors than merely the plaintiff's resi-

dence, the place of the wrong, and the connections with the forum state, as suggested by defendants in reliance on *Hampshire*. It also requires consideration whether the foreign law sought to be applied will benefit the interests it was designed to protect. *Olmstead*, 428 Mich. at 28-29.

V.

The Florida statute of repose in effect at the time of plaintiff's accident provides:

> Actions for products liability ... must be begun within the period prescribed by this chapter ... *but in any event within twelve years after the date of delivery of the completed product to its original purchaser* ..., regardless of the date the defect in the product ... was or should have been discovered.

(Emphasis added.) Although legislative history concerning the statute is scarce, it was presumably designed to protect Florida manufacturers from liability for injuries caused by products which had been on the market for over twelve years. 11 Nova L.J. 849, 852 (1987).[5]

Defendant argues that Florida's statute of repose applies because Florida is where plaintiff resides, the vehicle was licensed, the accident occurred, and the injuries sustained. Moreover, defendant points out that it does business in Florida. However, if applied, the Florida statute of repose would not benefit the interest it was designed to protect.

---

[5] Notably, it was not until the Florida Supreme Court answered a certified question in *Pullum v. Cincinnati Inc.*, 476 So.2d 657, 659 (1985), that the Florida statute of repose was upheld as constitutional even if it barred access to the courts. The statute of repose was amended by the legislature the following year and reference to product liability claims was deleted. 11 Nova L.J. 849, 859 (1987).

Instead of protecting a Florida manufacturer as intended, the statute of repose would protect an out-of-state manufacturer at the expense of a Florida resident.

Plainly, the Florida statute does not benefit plaintiff, a Florida resident, under the circumstances of this case since the statute would bar her action against a nonresident defendant whose own state law, the law of Michigan, affords no similar protection for a manufacturer. *Olmstead, supra*, at 29. Further, defendants cannot argue that applying Michigan law would defeat their expectations since the individual defendants reside there and defendant Ford Motor Company has its headquarters in that state. *Olmstead, supra*, at 27. Thus, there is simply no reason to extend the benefits of the Florida statute of repose to the Michigan defendants. Since Florida has no interest in having its statute of repose applied, Michigan law applies without regard to the nature or quality of Michigan's interests. *Olmstead, supra*, at 30.

We hold, therefore, that since there is no rational reason to displace Michigan law, the presumptive *lex fori* rule directs that Michigan law governs the case.

The judgment of the district court is REVERSED and the case is REMANDED for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHRISTINE MAHNE,
Individually and as Parent,
Guardian and Best or Next
Friend of MARLO MAHNE,
a minor,
Plaintiffs,

C.A. No. 87-CV-60110-AA

vs.

FORD MOTOR COMPANY, et al.,
Defendants.

HON. GEORGE La PLATA

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

On August 16, 1985, Plaintiff, Marlo Mahne, then fifteen years of age, was a rear seat passenger in a 1967 Mustang manufactured and designed by Defendant, Ford Motor Company.[1] The vehicle, which was stopped at a light just south of Fort Pierce, Florida, burst into flames after it

[1] Although Christine Mahne is the proper Plaintiff in this action individually and as next of friend for Marlo Mahne, for simplicity sake, Marlo shall be referred to as Plaintiff.

was struck in the rear by another vehicle. As a result, Marlo Mahne suffered severe third and fourth degree burns over 70% of her body.

Plaintiff, on April 2, 1987, commenced this product liability action against three named Defendants including Ford Motor Company, Donald Petersen and Harold MacDonald. In Count I, Negligence, of her two count Complaint, Plaintiff avers that "Defendants had a duty to design, manufacture, test and sell the Ford Mustang vehicle in conformance to Michigan Common Law and Statutes." Specifically, Plaintiff contends that the Defendants negligently and carelessly designed, manufactured and tested the fuel system and rear-end structure in question so that it could not withstand reasonably foreseeable impact. Alleging that the Mustang was defective, unreasonably dangerous, unsafe and unfit for its reasonably foreseeable uses, Plaintiff maintains in Count II that Defendants breached an implied warranty.

II. CHOICE OF LAWS

As a preliminary question, the Court must determine whether Florida or Michigan substantive law controls this action. In suits governed by state law a federal court applies the choice of law rules of the forum state.[2] Because of the exhaustive history contained in a multitude of Michigan court decisions regarding the demise of the traditional *lex loci delicti* rule, the law of the state where the wrong occurred governs, the pervasive existing rule will be discussed.[3]

---

[2] *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941).

[3] See *Olmstead* v. *Anderson*, 377 N.W.2d 853 (1987); *Sexton* v. *Ryder Truck Rental, Inc.*, 320 N.W.2d 843 (1982).

After the release of numerous decisions by the Court of Appeals which entertained the choice of laws issue, the Michigan Supreme Court, realizing the need for uniformity, adopted the interests-balancing approach. Specifically, the Court stated:

> "In sum, Michigan courts have not been entirely consistent in interpreting *Sexton* as being applicable only in cases where the parties are all Michigan residents bringing an action for personal injury. Other courts have read *Sexton* to automatically require a balancing of interests in the event that the case before them is not on all fours with *Sexton*. The latter view appears to be the position in the majority of cases, as well as the trend."[4]

The cases in which the plaintiff was not a resident but brought suit in Michigan have generally applied *lex loci delicti*, either through a strict reading of *Sexton* or by weighing the interests of the states involved.[5]

In the instant case, because Plaintiff resides in [Florida] and Defendant is headquartered in Michigan, the question to be resolved is whether this case presents a situation in which reason requires that foreign law supersede the law of this state. Recently, the Michigan Court of Appeals, in *Hampshire* v. *Ford Motor Company*[6] was presented virtually an identical set of facts facing this Court. In *Hampshire*, Plaintiff, a California resident, was injured in a motor vehicle accident which occurred in California. As a result of his injuries, Plaintiff instituted an action in Michigan against the manufacturer, Ford Motor Com-

---

[4] *Olmstead* at 298.

[5] *Vogh* v. *American International Rent-A-Car, Inc.*, 350 N.W.2d 882 (1984).

[6] 399 N.W.2d 36 (1986).

pany, alleging negligent design of the ignition locking system. Recognizing the need to employ the balance of interest test, the Court, determining that California substantive law applied, considered that:

(1) Plaintiff resided in California;

(2) the accident occurred in California;

(3) the Ford vehicle was registered in California;

(4) at the hearing on Defendant's Motion for Summary Judgment, Plaintiff's counsel did not object to the application of California law; and

(5) the connections to Michigan are limited to the fact that Ford's headquarters are located in Michigan and the action was filed in this state.

In the instant case, Plaintiff resides in Florida, the accident occurred in Florida, the vehicles involved were registered and insured in Florida and the connections to Michigan are limited to the situs of Defendant's headquarters and the Plaintiff's choice of forum. While it is true that no specific methodology for employment of the interest balancing test has been adopted, leaving each case to be evaluated on the circumstances presented, the facts in this action parallel the facts presented in *Hampshire*. In light of the Sixth Circuit Court of Appeals decisions in *Bennett* v. *Enstrom Helicopter Corp.*,[7] and noting that there is no general public policy in Michigan to protect all who buy products manufactured in Michigan,[8] this Court is persuaded that the holding in *Hampshire* is controlling. Accordingly, Florida substantive law governs this action.

---

[7] 686 F.2d 406 (6th Cir. 1982).

[8] *Buettgen* v. *Volkswagen A.G.*, 505 F.Supp. 84 (E.D. Mich. 1980).

III. MOTION TO DISMISS

Having determined that Florida substantive law governs this action, the Court turns to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment.[9] In their motions Defendants maintain that the Florida Statute of Repose bars Plaintiff's suit. Conversely, Plaintiff contends that the Statute of Repose is a procedural statute of limitation and thus should not be applied to an action filed in Michigan. Specifically, §95.031(2), Florida Statute (1985), provides in pertinent part:

> (2) Actions for products liability and fraud under §95.11(3) must be begun within the period prescribed by this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence . . . *but in any event within 12 years after the date of delivery of the completed product to its original purchaser* . . . regardless of the date the defect in the product . . . was or should have been discovered." (emphasis added)

Whether the Statute of Respose is substantive or procedural, its effect on this action is consistent. Because the Court has previously concluded that Florida substantive law governs this action, if the statute is deemed substantive law its application to a product liability action involving a vehicle which has been in the stream of commerce well in excess of twelve years would bar this action. If the statute is deemed procedural in nature the Michigan

---

[9] Each Defendant, Petersen, Ford Motor Company and MacDonald, filed a separate Motion to Dismiss or in Alternative for Summary Judgment addressing basically the same issues. For simplicity sake all three motions shall be entertained in this opinion.

borrowing statute would apply. Specifically, M.C.L.A. §600.5861 provides:

> "An action based upon a cause of action accruing without this state shall not be commenced after the expiration of the statute of limitations of either this state or the place without this state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of this state the statute of limitations of this state shall apply."

Because the cause of action accrued in Florida, the time when all elements of the cause of action were present, and because Plaintiff is not a resident of the State of Michigan, the Florida statute of limitations must be borrowed and applied to this action.[10, 11]

In 1986 the Florida legislature amended section 95.031(2) repealing the Statute of Repose in product liability actions. The Plaintiff contends that the repeal of this statute should be applied retroactively. The Supreme Court of Florida in *Melendez* v. *Dreis and Krum Manufacturing Company*[12] recently put this issue to rest. Specifically, the Court stated that because there was no clear manifestation of retroactive effect, the amended statute cannot operate retrospectively.

In an attempt to circumvent the application of the borrowing statute to this action, Plaintiff maintains that

---

[10] *Buettgen*, supra at 853.

[11] Under this section, the period of limitation applicable to an action filed in Michigan by a nonresident and based on a cause of action that accrued outside of Michigan is either that which is provided by the statute in Michigan or that which is provided by the state where the cause of action accrued, whichever bars the action. See, *Markarow* v. *Volkswagen of America, Inc.*, 403 N.W.2d 563 (1987).

[12]

because Defendants Petersen and MacDonald could not be sued in Florida the cause of action could not have accrued there and thus the Florida Statute of Repose can not offer them protection. In light of the primary purpose of the borrowing statute, to prevent forum shopping, Plaintiff's position at first blush contains merit.[13] However, in Michigan, a cause of action accrues where the accident occurred.[14] A review of the Michigan cases does not offer an alternative determination of when or where an action accrues. Accordingly, the Court is bound by the interpretation which the Michigan courts have ascribed.

IV. CONCLUSION

While this Court is genuinely sympathetic to the Plaintiff, the Statute of Repose bars this action. In GRANTING Defendant's Motion, Plaintiff's Complaint is DISMISSED.

/s/George La Plata
GEORGE La PLATA
U.S. District Judge

September 28, 1988
Ann Arbor, MI

---

[13] In support of her position, Plaintiff relies on a Second Circuit Court of Appeals action in which the Court, when interpreting a similar borrowing statute, opined:

> "When it (the borrowing statute, CPLR 202) speaks of "accrual" of a cause of action, it must logically refer to a cause of action upon which a lawsuit may be brought. . ."
>
> Although the immediate occasion of the reference was to the time when a cause of action began, the statement reflects the New York Court's perceptive awareness that application of New York's borrowing statute depends upon the presence of its key ingredient, "a cause of action upon which a lawsuit may be brought."

Stafford v. *International Harvester Co.*, 668 F.2d 142, 151 (1981).

[14] See *Turner* v. *Ford Motor Co.*, 265 N.W.2d 400, 402 (1978); *Parish* v. *B.F. Goodrich Co.*, 235 N.W.2d 570 (1975).

APPENDIX C

No. 88-2137

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTINE MAHNE,	)	
	)	
Plaintiff-Appellant	)	
vs.	)	ORDER
	)	
FORD MOTOR COMPANY, ET AL.,	)	
	)	
Defendants-Appellees	)	

[Filed August 24, 1989]

Upon consideration of the motion of the appellant for certification to the Supreme Court of the State of Michigan of a controlling question of law, and the response of the appellees in opposition thereto,

IT IS **ORDERED** that the motion be, and it hereby is, denied.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/Leonard Green/dr

APPENDIX D

No. 88-2137

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTINE MAHNE, PARENT, GUARDIAN AND BEST OR NEXT FRIEND OF MARLO MAHNE, A MINOR, Plaintiff-Appellant,	)	
v.	)	ORDER
FORD MOTOR COMPANY; DONALD PETERSEN; HAROLD MacDONALD, Defendants-Appellees	)	

[Filed June 18, 1990]

BEFORE: NELSON and RYAN, Circuit Judges; and MEREDITH*, United States District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

* Hon. Ronald E. Meredith sitting by designation from the Western District of Kentucky.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk

APPENDIX E

STATUTES AND RULES INVOLVED

The Florida statute of repose relevant to this products liability suit provides:

> Actions for products liability and fraud under s.95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s.95.11(3), *but in any event within 12 years after the date of delivery of the completed product to its original purchaser* or within 12 years after the date of the commission of the alleged fraud, *regardless of the date the defect in the product* or the fraud *was or should have been discovered.*

Fla. Stat. Ann. § 95.031(2) (West 1982) (emphasis added).

The Michigan Rules of Court provide the following procedure for the certification of state-law issues to the Michigan Supreme Court:

> When a federal court or state appellate court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Michigan Supreme Court.

Mich. Ct. R. 7.305(B) (West Supp. 1989).

The Florida Rules of Appellate Procedure provide the following procedure for the certification of state-law issues to the Florida Supreme Court:

> The discretionary jurisdiction of the Supreme Court may be sought to review * * * questions of law certified by the Supreme Court of the United States or a United States Court of Appeals that are determinative of the cause of action and for which there is no controlling precedent of the Supreme Court of Florida.
>
> * * * * *
>
> Upon either its own motion or that of a party, the Supreme Court of the United States or the United States Court of Appeals may certify a question of law to the Supreme Court of Florida whenever the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida.

Fla. R. App. P. 9.030(a)(2)(C), 9.150(a) (West 1983).

APPENDIX F

RULE 29.1 LIST OF SUBSIDIARY COMPANIES

Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns a significant (not necessarily controlling) interest, but which are not wholly-owned by Ford:

United States of America

Airlease Ltd.
Aries Technology
AT&T Automotive Services, Inc.
AT&T Fleet Services
Autolatina America, Inc., (Del)
Beech Holdings
Capricorn Investors Ltd.
Carlex Glass Company
Carnegie Group Inc., (Del)
Ceradyne, Inc.
Cimflex Teknowledge Corporation, (Penn)
Dunlop Automotive Composites Inc., (Delaware)
Edelson Technology Partners II
Eveleth Taconite Company, (Minn)
Excel Industries, Inc.
Fairtel Associates
Gecars, Inc.
Humbolt Mining Company
Inference Corporation
Lincoln-Rowe Management, (Mich)
Metropolitan Realty Corporation
New River Castings Company
Park Ridge Corporation, (Del)
Penstone, Inc.
Renaissance Center Venture
Rouge Steel Company
Seating Systems Technology, Inc.

Software Productivity Consortium
T.G. Ford Assoc.
U.S. Equipment Income Fund I
U.S. Equipment Income Fund II
U.S. Equipment Income Fund III
The American Road Insurance Company, (Mich)
View Engineering, Inc.

Argentina

Autolatina Argentina S.A.
Autolatina Argentina S.A. de Ahorro Para Fines Determinados
Invercred Compania Financiere S.A.
Transax Sociedad Anonima, Comercial, Industrial, y Financiera
Volkswagen Inversiones S.A.
Volkswagen Sociedad Anonima de Ahorro Para Fines Determinados

Australia

Australian Road Credit Limited
Ford Aerospace of Australia Pty., Ltd.
Ford Credit Australia Limited
Ford Credit Australia Wholesale Limited
Ford Motor Company of Australia Limited
Ford New Holland Australia Limited
Ford Sales Company of Australia Limited
New Holland Holdings Pty., Limited

Austria

Ford Bank Aktiengesellschaft (Austria)
Ford Motor Company (Austria) K.G.

Belgium

Ford Credit N.V.
Ford Motor Company (Belgium) N.V.
Ford Tractor (Belgium) Limited

Brazil

Apolo—Administradora de Bens S/C Ltda.
Autolatina Distribuidora de Titulos e Valores Mobiliaros Ltda.
Autolatina Financiadora S.A.—Credito, Financiamento e Invest.
Autolatina Leasing S/A—Arrandamento Mercantil
Autolatina Previdencia Privada
Autolatina S.A.
Autolatina—Comercio, Negocios e Participacoes Ltda.
Consorcio Nacional Ford Ltda.
Consorcio Nacional Volkswagen Ltda.
Ford Brasil S.A.
Ford Distribuidora de Productos de Petroleo Ltda.
Inter-Locadora S/A
Sociedade Paulista de Aparelhos Domesticos "SPAD" Ltda.
Transglobal Corretagem de Seguros Ltda.
Volkswagen de Brasil S/A
Volkswagen Factoring—Fomento Comercial S/A

Canada

Conix Corporation, (Del.)
Ford Motor Company of Canada, Limited
Nascote Industries, Inc., (Del.)
Trans Canada Glass Ltd.

Denmark

Ford Motor Company A/S

England

A C Cars Limited
Aston Martin (RDP) Limited
Aston Martin Finance Limited
Aston Martin Lagonda Design Limited
Aston Martin Lagonda Group Limited
Aston Martin Lagonda Limited

Aston Martin Lagonda U.S.A., Inc.
Aston Martin Sales Limited
Auto Club International Limited
Automotive Finance Limited
Dunlop Automotive Composites (UK) Limited
Iveco Ford Truck Limited
Lagonda Properties Limited

Finland

Oy FORD AO

Germany

Ford Investitions-GmbH
Ford Versorgungs-Und Unterstutzungseinrichtung GmbH

Holland

Ford Nederland B.V.

India

Escorts Tractors Limited

Japan

Autorama, Inc.
Hokkai Ford Tractor Co., Ltd.
Japan Climate Systems Corporation
Mazda Motor Corporation

Korea

Kia Motors Corporation
Korean Automotive Products Corporation

Mexico

Fabrica de Tractores Agricolas S.A. de C.V.
Implementos Agricolas Mexicanos, S.A.
ACONA B.V.
Nemak S.A.
Vitroflex S.A.

New Zealand

Vehicle Assemblers New Zealand Ltd.

Norway

Ford Motor Norge A.S.
Ford New Holland A/S

Sweden

Ford Credit AB
Ford Motor Company Aktiebolag

Switzerland

Ford Credit S.A.

Taiwan

Ford Enterprise Company Taiwan, Ltd.
Ford Lio Ho Motor Co. Ltd.

Turkey

Otosan Otomobile Sanayii A.S.

Venezuela

FANATRACTO—Fabrica Nacional de Tractores y Montores S.A.

AMIM Holdings Sdn. Bhd.
Associated Motor Industries Malaysia SDN.BHD.
Ford Taiwan Services, Limited
Halla Climate Control Corporation
Oy Ford Credit Rahoitus
Transcom Insurance Limited

AUTOMOBILE DEALERSHIPS

Al Bennett Ford Sales of Flint, Inc.
Al Neyer Ford, Inc.
Alberts-Johnson Ford, Inc.
Albion Ford-Mercury, Inc.
Alpena Ford Lincoln-Mercury, Inc.
Altoona Ford, Inc.
Baranco Lincoln-Mercury, Inc.
Bear Country Ford Lincoln-Mercury, Inc.
Berea Ford, Inc.
Big Valley Ford Lincoln-Mercury, Inc.
Will Russell Ford, Inc.
Buffalo Ford-Mercury, Inc.
C&L Lincoln-Mercury, Inc.
Campus Ford, Inc.
Canal Ford Lincoln-Mercury, Inc.
Castle Rock Ford-Mercury, Inc.
Champion Ford of Scranton, Inc.
Champion Motors, Inc.
Clinton Ford Lincoln-Mercury, Inc.
Coastal Ford, Inc.
Columbus Ford-Mercury, Inc.
Community Ford-Mercury, Inc.
Cornelia Ford Lincoln-Mercury, Inc.
Courtesy Ford Lincoln-Mercury Sales, Inc.
Courtesy Ford Lincoln-Mercury, Inc.
Cranberry Lincoln-Mercury, Inc.
Crossroads Ford-Mercury, Inc.
Crossroads Ford, Inc.
Crown Lincoln-Mercury, Inc.
Delta Ford Sales, Inc.

Duryea Ford, Inc.
Dyersburg Ford Lincoln-Mercury, Inc.
Economy Ford, Inc.
Edgar Ford, Inc.
Elkins Fordland, Inc.
Empire Ford, Inc.
Fairway Ford of Augusta, Inc.
Farmington Ford-Mercury, Inc.
Fort Valley Ford, Inc.
Freedom Ford Sales, Inc.
Friendship Ford, Inc.
Ft. Walton Beach Lincoln-Mercury, Inc.
Gold Star Ford Lincoln-Mercury, Inc.
Greater Cleveland Ford Mercury, Inc.
Green River Ford-Mercury, Inc.
Greenville Ford-Mercury, Inc.
Harbor Lincoln-Mercury, Inc.
Heritage Ford-Mercury, Inc.
Highland LM DBA Tyson LM
Hillsboro Ford-Mercury Sales, Inc.
Hood River Ford-Mercury, Inc.
Hub City Ford-Mercury, Inc.
Hunt County FLM, Inc., DBA Greenville FLM
Illini Lincoln-Mercury Sales, Inc.
Independence Ford, Inc.
Lake County Ford-Mercury, Inc.
Lakeland Ford Lincoln-Mercury, Inc.
Leader Motors Inc., DBA Leader L-M
Los Ramos Ford Lincoln-Mercury, Inc.
M&M Ford Lincoln-Mercury, Inc.
Marino Ford, Inc.
Marksville Ford Lincoln-Mercury, Inc.
McGehee Auto Plaza, Inc.
Metro Ford Automobile Sales, Inc.
Mon Valley Lincoln-Mercury, Inc.
Mountain Home Ford-Lincoln-Mercury, Inc.
Natchitoches Ford L-M Sales, Inc.
Noble Ford Lincoln-Mercury West, Inc.
Northhampton Ford, Inc.

Northwoods Ford-Lincoln-Mercury, Inc.
Osseo Ford, Inc.
Ottawa Ford Lincoln-Mercury, Inc.
Park Ford Sales, Inc.
Pavilion Lincoln-Mercury, Inc.
Pochelon Lincoln-Mercury, Inc.
Red Bluff Ford-Mercury, Inc.
Ripon Ford-Mercury, Inc.
River View Ford-Mercury, Inc.
Royal Lincoln-Mercury Sales, Inc.
Saginaw Ford DBA All American Ford
Shoals Ford, Inc.
Sonoma Ford, Inc., DBA Sonoma Ford-L-M
Spalding Ford Lincoln Mercury Sales, Inc.
Springfield Ford Lincoln-Mercury, Inc.
Suburban Ford Lincoln-Mercury, Inc.
Sun Valley Ford Lincoln-Mercury, Inc.
Sunbelt Ford-Mercury, Inc.
Team Ford, Inc.
Tower Ford Mercury, Inc.
Town & Country Lincoln-Mercury, Inc.
Tropical Ford, Inc.
Ukiah Ford-Lincoln Mercury, Inc.
Union City Ford Lincoln-Mercury, Inc.
Universal Ford Sales, Inc.
University Ford of Peoria, Inc.
Vandalia Ford Lincoln-Mercury, Inc.
Varsity Ford Lincoln-Mercury, Inc.
Verde Valley Ford Lincoln-Mercury, Inc.
Victory Ford, Inc.
Wellington Circle Motors, Inc.
West Covina Lincoln-Mercury, Inc.
Western Ford-Mercury, Inc.
Westwood Ford Lincoln-Mercury, Inc.
Yakima Valley LM DBA Sun City LM
32 Ford-Mercury, Inc.

TRUCK DEALERSHIPS

Atlantic Ford Truck Sales, Inc.
Bayou City Ford Truck Sales, Inc.
Beltway Ford Truck Sales, Inc.
Bi-State Ford Truck Sales, Inc.
Bridge-Haven Ford Truck Sales, Inc.
Central Ford Truck Sales, Inc.
Crossroads Ford Truck Sales, Inc.
Delta Trucklease, Inc.
Golden State Ford Truck Sales, Inc.
Keystone Ford Truck Sales, Inc.
Lakeland Ford Truck Sales, Inc.
Mid-Cal Ford Truck Sales, Inc.
Mid-States Ford Truck Sales, Inc.
Miramar Ford Truck Sales, Inc.
Motor City Ford Truck, Inc.
Northside Ford Truck Sales, Inc.
River City Ford Truck Sales, Inc.
Sacramento Valley Ford Truck Sales, Inc.
Shamrock Ford Truck Sales, Inc.
Sooner State Ford Truck Sales, Inc.
Southside Ford Truck Sales, Inc.
Tri-State Ford Truck Sales, Inc.
Truck City Ford Sales, Inc.
West Gate Ford Truck Sales, Inc.

(2)

No. 90-448

FILED
OCT 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FORD MOTOR COMPANY, ET AL.
PETITIONERS

v.

CHRISTINE MAHNE,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT A. SEDLER
Wayne State University Law School
468 West Ferry
Detroit, Michigan 48202
(313) 577-3968

EDWARD M. RICCI*
Edward Ricci & Associates, P.A.
1645 Palm Beach Lakes Blvd.,
Suite 250
P.O. Box 2946
West Palm Beach, Florida 33402
(407) 684-6500
* Counsel of Record
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 4

I. THERE ARE NO "SPECIAL AND IMPORTANT REASONS" JUSTIFYING REVIEW BY THIS COURT IN THE PRESENT CASE 4

II. THERE IS NO CONNECTION WHATSOEVER BETWEEN THE QUESTION PRESENTED IN THIS CASE AND THE QUESTION PRESENTED IN *SALVE REGINA COLLEGE V. RUSSELL* 8

III. A COURT OF APPEALS IS NOT REQUIRED TO EMPLOY CERTIFICATION MERELY BECAUSE IT CONCLUDES THAT THE DISTRICT COURT ERRED IN ITS APPLICATION OF SETTLED PRINCIPLES OF STATE LAW 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Bonelli v. Volkswagen of America, 166 Mich.App. 483, 421 N.W.2d 213 (1988) 7

Commissioner of Internal Revenue v. Bosch, 387 U.S. 456 (1967) 7

Diggs v. Pepsi-Cola Bottling Co., 861 F.2d 914 (6th Cir. 1988) 9

Erie R.Co. v. Tompkins, 304 U.S. 64 (1938) . . . 7

Gillette Dairy,Inc. v. Mallard Manufacturing Corp., 707 F.2d 351 (8th Cir. 1983) 6

Hampshire v. Ford Motor Co., 155 Mich.App. 143, 399 N.W.2d 36 (1986) 6, 7

Lehman Brothers v. Schein, 416 U.S. 386 (1974) 11

Magnum Company v. Coty, 262 U.S. 159 (1923) 4

Olmstead v. Anderson, 428 Mich. 1, 400 N.W.2d 292 (1987) . . . . . *passim*

Salve Regina College v. Russell, 890 F.2d 484 (1st Cir. 1989), *cert.granted*, 58 U.S.L.W. 3834, 6/28/90 . . . . . 6, 8, 9, 10

Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980) 9

No. 90-448

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FORD MOTOR COMPANY, ET AL.
PETITIONERS

v.

CHRISTINE MAHNE,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

The petitioner correctly states the procedural history of the case and sets forth certain facts in the light most favorable to the petitioner. However, the petitioner tries to down play what are the most significant facts in this case in light of the specific approach to choice of law that was adopted by the Michigan Supreme Court in *Olmstead v. Anderson*, 428 Mich. 1, 400 N.W.2d 292 (1987). These facts are that Ford Motor Company is a Michigan corporation, with its world headquarters and principal manufacturing facilities in Dearborn, Michigan, and that all the facts relating to the design, manufacture and testing of the 1967 Ford Mustang took place in Dearborn. Ford conducts no manufacturing activities whatsoever in Florida.

The petitioner also only makes passing reference in a footnote to its position with respect to certification in the Court of Appeals. There the respondent filed a motion for certification of the choice of law issue to the Michigan Supreme Court. While maintaining that under the specific approach to choice of law adopted by the Michigan Supreme Court in *Olmstead*, Michigan law would not be displaced in favor of Florida law in the present case, the respondent observed that the fact-law pattern in the present case was not identical to the fact-law pattern in *Olmstead*, so that certification of the choice of law question to the Michigan Supreme Court would be appropriate. The petitioner vigorously opposed certification. The Court Appeals denied the motion for certification and resolved the choice of law issue itself.

In addition, the petitioner fails to point out that while its petition for certiorari is pending in this Court, the case is moving toward a trial on the merits in the District Court. The petitioner did not seek a stay of the proceedings in the District Court. The parties are now engaged in extensive discovery, and petitioner's response to the respondent's interrogatories and request for production of documents is due no later than November 1, 1990. The case has been set for jury trial on February 4, 1991. All that is required of the petitioner at this stage of the proceedings is that it defend the respondent's products liability claim under Michigan law in a federal court in Michigan.

Finally, the petitioner fails to discuss at all the specific approach to choice of law in Michigan that was adopted by the Michigan Supreme Court in *Olmstead*. This omission is startling, since the essence of the petitioner's argument in this Court is that the Court of Appeals committed some kind of "serious error" when it applied that approach to the facts of this case and reached a different result from that reached by the District Judge. The respondent will now briefly summarize Michigan's specific approach to choice of law.

In *Olmstead*, the Michigan Supreme Court adopted a specific approach to choice of law, which supersedes all prior choice of law decisions by the lower courts in Michigan. This specific approach was carefully reviewed by Judge Ryan in his unanimous opinion for the Court of Appeals in the present case.[1] Michigan's *lex fori* approach consists of three elements. *One*: The basic law is the law of the forum, Michigan, and the question in a conflicts case is whether that case "presents a situation in which reason requires that foreign law supersede the law of this state." 900 F.2d at 86, quoting *Olmstead*, 400 N.W.2d at 292. *Two*: The question of displacement of Michigan law is determined by the use of interest analysis, that is, by a consideration of the policies reflected in the laws of the involved states, and the interest of each state, in light of that policy, in having its law applied on the point in issue in the particular case. 900 F.2d at 87, citing *Olmstead*, 400 N.W.2d at 292. *Three*: When the state whose law is sought to be applied in preference to Michigan law has no interest in applying its law in order to implement the policy reflected in that law, Michigan law applies as the law of the forum. *Id.*[2]

In the present case, the Court of Appeals held that Michigan law applied as the law of the forum, because under the Michigan Supreme Court's application of interest analysis, Michigan would conclude that Florida had no interest in applying the

---

[1] Judge Ryan served as a Michigan state trial court judge for nine years and as a Justice of the Michigan Supreme Court for ten years before his appointment to the United States Court of Appeals for the Sixth Circuit in December, 1985. Despite Judge Ryan's preference for the *lex loci delicti* rule in tort cases when he sat on the Michigan Supreme Court, 900 F.2d at 85,n.3, in the present case he was bound to follow and apply the specific approach to choice of law adopted by his former colleagues in *Olmstead* and did so.

[2] It is only where the foreign state is found to have an interest in having its law applied that an analysis of Michigan's interests becomes necessary. In the absence of such an interest, Michigan law applies as the law of the forum. 900 F.2d at 87, citing *Olmstead*, 400 N.W.2d at 292.

manufacturer-protecting policy reflected in its statute of repose in favor of a Michigan manufacturer that carried on no manufacturing activities in Florida and that designed, manufactured and tested the allegedly defective product in Michigan. 900 F.2d at 88-89.[3]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. There Are No "Special and Important Reasons" Justifying Review by This Court in the Present Case.

The Petition for Certiorari in the present case is in flagrant violation of the longstanding principle that, "The [certiorari] jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Company v. Coty*, 262 U.S. 159, 163 (1923).). The present case involves nothing more than an application of settled principles of state law in a diversity case. The Court of Appeals unanimously held that under the specific approach to choice of law adopted by the Michigan Supreme Court in *Olmstead*, the Michigan Supreme Court would not displace Michigan substantive law in a products claim brought

---

[3] Under Michigan's specific approach to choice of law, it is completely irrelevant whether or not Florida would apply its statute of repose in the event that the suit had been brought there. Since the Michigan courts would conclude that Florida did not have an interest in the application of its statute of repose to the facts of this case, the choice of law inquiry proceeds no further, and Michigan law applies as the law of the forum. Thus, as the petitioner seemingly fails to understand, there is simply no issue in this case as to the interpretation of Florida law by the Florida courts.

The Florida legislature repealed the statute of repose, effective October 1, 1986. While under Florida law, the repeal was not retroactive, so that the statute of repose could still be applied by the Florida courts to bar respondent's claim, the precise conflict of laws question in the present case could not arise again in a suit by a Florida victim against a Michigan manufacturer. In this sense, the present case is "one of a kind."

by an out-of-state victim against a Michigan manufacturer that designed, manufactured, and tested the allegedly defective product in Michigan. Unlike the District Judge, who completely ignored that approach and relied on a factually distinguishable and superseded decision of an intermediate appellate court, the Court of Appeals carefully applied that approach to the facts of the case at hand and predicted that the Michigan Supreme Court would hold that in this case, "since there is no rational reason to displace Michigan law, the presumptive *lex fori* rule directs that Michigan law governs this case." 900 F.2d at 89.

In a desperate attempt to get another hearing in this Court and to avoid defending the claim on the merits under Michigan law, Ford tries to make it appear that this case presents important "*Erie* questions," and accuses the Court of Appeals of "disregarding the fundamental principles established by this Court to guide a federal court's determination of state law. (Petition for Certiorari, p. 11). The gravamen of this charge is nothing more, however, than that the Court of Appeals disagreed with the District Judge on the question of whether Michigan law would be displaced on the facts of this case. According to Ford's flawed reasoning, every time the Court of Appeals reverses the District Judge on a state law question, it acts improperly, because it does not "defer to the District Judge's interpretation of state law" and renders a "*de novo* interpretation of often unfamiliar state law." (Petition for Certiorari, pp. 18-19).

This argument is utter nonsense, both as applied to the facts of the present case and to any situation where the Court of Appeals reverses a District Judge on a state law question. Carried to its logical conclusion, it would render a District Judge's decision on a state law question completely unreviewable in the Court of Appeals. That, of course, is not the law.[4] It

[4] If Congress wants to insulate state law questions from appellate review, it can do so by statute. Under present law, however, such questions are fully reviewable in the Court of Appeals. Interestingly enough, in its amicus brief in support of the respondent in *Salve Regina*, the present petitioner recognizes

footnote continued

is one thing to give deference to a District Judge's determination of an unsettled question of state law, as in *Salve Regina College v. Russell*, 890 F.2d 484 (1st Cir. 1989), *cert.granted*, 58 U.S.L.W. 3834, 6/28/90. It is quite another thing for the Court of Appeals to "defer" to a District Judge's attempted application of settled principles of state law to the facts of a particular case, where the Court of Appeals finds that the "district court has not correctly applied local law, or if such interpretation of state law is fundamentally deficient in analysis or otherwise lacking in reasoned authority." *Gillette Dairy,Inc. v. Mallard Manufacturing Corp.*, 707 F.2d 351, 353 (8th Cir. 1983). So long as decisions of District Judges on state law questions are reviewable in the Court of Appeals, the Court of Appeals, while giving deference to the decision of the District Judge in an appropriate case, must review that decision and must set it aside whenever the District Judge has committed clear error.

In the present case, the District Judge not only committed clear error in his application of settled principles of Michigan conflicts law to the facts of the present case, but, to borrow from Ford's Petition for Certiorari, he "disregard[ed] the fundamental principles established by this Court to guide a federal court's determination of state law." Instead of applying to the facts of this case the specific approach to choice of law adopted by the Michigan Supreme Court in *Olmstead*, the District Judge gave controlling effect to a factually distinguishable decision of the Michigan Court of Appeals,[5] notwithstanding that this decision

---

that "deference" does not mean "non-reviewability." "None of the courts of appeal has held that district court determinations of state law are *conclusively* presumed to be correct. To the contrary, the courts acknowledge that parties to diversity actions are entitled to meaningful appellate review of state law determinations." (Brief for the Ford Motor Company as Amicus Curiae in Support of Respondent, p. 7).

[5] This decision was *Hampshire v. Ford Motor Co.*, 155 Mich.App. 143, 399 N.W.2d 36 (1986), which the District Judge said, "presented virtually an identical state of facts" and which he found to be "controlling." However,

footnote continued

had been superseded by the specific approach to choice of law adopted by the Michigan Supreme Court in *Olmstead*.

The most "fundamental principle" established by this Court to guide a federal court's determination of state law is that federal courts must determine state law "as declared by its legislature in a statute or by its highest court in a decision." *Erie R.Co. v. Tompkins*, 304 U.S. 64, 78 (1938). While a decision of an intermediate state court is "datum" for ascertaining state law, it may not be followed where the federal court "is convinced by other persuasive data that the highest court of the state would decide otherwise." *Commissioner of Internal Revenue v. Bosch*, 387 U.S. 456, 465 (1967). Once the Michigan Supreme Court adopted a specific approach to choice of law in *Olmstead*, that specific approach superseded all pre-*Olmstead* decisions,[6] and

---

as the Court of Appeals noted, the facts of *Hampshire* were quite different from those of the present case in that in *Hampshire*, "the sole connections to Michigan were that the defendant's headquarters were there and the action was filed in that state," and in *Hampshire*, "the plaintiff did not object to the application of California law on the defendant's motion for summary judgment." 900 F.2d at 88. In the present case, by contrast, everything relating to the design, manufacturing and testing of the 1967 Ford Mustang occurred in Michigan, and,to say the least, the plaintiff strongly insisted on the application of Michigan law. In the present case, the Court of Appeals found that the District Judge erred in giving "controlling effect" to *Hampshire* and that *Hampshire* was distinguishable on its facts: "[w]e are satisfied that, on the facts before us, we need not make a comparative analysis of the interests of Michigan and the foreign state as was done in *Hampshire*." *Id.* Again, this was because in this case Florida had no interest in applying the manufacturer-protecting policy reflected in its statute of repose in favor of a Michigan manufacturer that carried on no manufacturing activities whatsoever in Florida and that designed, manufactured and tested the allegedly defective product in Michigan.

[6] After *Olmstead*, the Michigan Court of Appeals likewise was required to apply the specific approach of *Olmstead* to the choice of law question presented in a particular case. It did so in *Bonelli v. Volkswagen of America*, 166 Mich.App. 483, 421 N.W.2d 213 (1988) (which, curiously enough is cited by Ford in its Petition for Certiorari, p. 13, n.5), where it held that even

footnote continued

a federal court seeking to ascertain Michigan conflicts law in a diversity case was bound to carefully apply the *Olmstead* approach to the choice of law question presented in the particular case. This is exactly what the Court of Appeals did in the present case, and this is exactly what the District Judge did not do. Thus, it was the District Judge who committed fundamental error, and the Court of Appeals could not compound this fundamental error by giving "deference" to a patently erroneous decision of the District Judge.

II. There Is No Connection Whatsoever Between the Question Presented in This Case and the Question Presented in Salve Regina College v. Russell.

The petitioner's efforts to "latch on" to this Court's grant of certiorari in *Salve Regina College v. Russell* are simply ludicrous. The issue in *Salve Regina* is whether in a diversity case a party is entitled to *de novo* review of a District Judge's determination of state law, so that the Court of Appeals can give no deference whatsoever to such determination. That case involved deference to the District Judge on a question of interpretation of unsettled state law - in a case of first impression whether the Rhode Island Supreme Court would apply the substantial performance standard to a contract between a student and a college - and the First Circuit held that such deference was appropriate on this question.[7] In the present case, by contrast,

---

though New York law controlled the interpretation of the contract in question, Michigan tort law controlled the determination of the elements of the tort of intentional interference with a business relationship, since Michigan was the site of the alleged injury and of the plaintiff's residence. In that circumstance, the Court of Appeals, applying the *Olmstead* approach, concluded that no reason to displace Michigan law was shown. There is no post-*Olmstead* decision in which the Michigan Court of Appeals held that Michigan law was to be displaced in a torts case.

[7] As the First Circuit stated: "In this case of first impression, the district court held that the Rhode Island Supreme Court would apply the substantial performance standard to the contract in question. In view of the customary

footnote continued

there is no question of interpretation of unsettled state law: Michigan conflicts law is clear and is found in the specific approach to choice of law adopted by the Michigan Supreme Court in *Olmstead*. The only question in the present case involves the application of that specific approach to a choice of law issue arising under the facts of a particular case.

Moreover, the Sixth Circuit follows the same "customary appellate deference" approach to the District Judge's decisions on state law questions as does the First Circuit. In an appropriate case, deference will be given.[8] Thus, in *Diggs v. Pepsi-Cola Metropolitan Bottling Co.*, 861 F.2d 914, 925-927 (6th Cir. 1988), where the District Judge made careful findings of fact and conclusions of law and dealt with conflicting state law precedents, the Sixth Circuit found that, "the precedent supporting the District Judge is much more persuasive," and concluded that it should accept the "considered view" of the District Judge. On the other hand, in *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980), where the District Judge relied on a decision of a Tennessee intermediate appellate court to hold that Tennessee law would not recognize a cause of action for legal malpractice in the conduct of litigation, but ignored "inclusive language" in prior decisions of the Tennessee Supreme Court that would support recognition of such a cause of action, the Sixth Circuit found that the District Judge erred in his interpretation of state law.

---

appellate deference accorded to interpretations of state law by federal judges of that state, we hold that the district court's determination that the Rhode Island Supreme Court would apply standard contract principles is not reversible error." 890 F.2d at 489 (citations omitted).

[8] Interestingly enough, in its amicus curiae brief in support of the respondent in *Salve Regina*, the present petitioner lists the Sixth Circuit among the Courts of Appeal that follow the "customary appellate deference" approach (Brief for the Ford Motor Company as Amicus Curiae in Support of Respondent, p.6, n.10).

Since the present case does not involve a question of deference to the District Judge on a question of interpretation of unsettled state law, and since the Sixth Circuit follows the same "customary appellate deference" approach to state law decisions of the District Judge as does the First Circuit, this Court's decision in *Salve Regina College*, either way, will be of no benefit whatsoever to the present petitioner. If this Court holds that *de novo* review is required in all cases, then the petitioner's "failure to defer" claim necessarily fails. But if this Court agrees with the First Circuit that deference is proper in appropriate cases, it will be approving what the Sixth Circuit is already doing.[9]

Therefore, there is no conceivable reason for this Court to allow the petitioner to "latch on" to the grant of certiorari in *Salve Regina* in order to further delay the trial of respondent's claim on the merits in the District Court.

III. A Court of Appeals Is Not Required to Employ Certification Merely Because It Concludes That the District Court Erred in Its Application of Settled Principles of State Law

It is the height of arrogance for the petitioner, which vigorously opposed any certification to the state court in the Court of Appeals, to now argue that the Court of Appeals erred in failing to do the very thing that the petitioner said it should not do. The petitioner's argument is a variant of "heads I win, tails you lose." Its post-judgment conversion to the virtues of

[9] Since the petitioner agrees that the District Judge's determination of state law is not conclusively presumed to be correct and that parties in diversity actions are entitled to meaningful appellate review of state law determinations (See Brief of Ford Motor Company as Amicus Curiae in Support of Respondent in *Salve Regina*, p.7), it is difficult to see what the petitioner can legitimately be complaining about in the present case. What it is complaining about, of course, is simply that the Court of Appeals disagreed with the District Judge's application of Michigan conflicts law in the particular case and ruled in favor of the respondent instead of the petitioner.

certification is premised on the rather dubious assumption that Michigan conflicts law was "clear" insofar as it supported petitioner's position that Michigan substantive law should be displaced, but suddenly became "unclear" when the Court of Appeals disagreed with that position and held that Michigan substantive law should not be displaced. In the present case, Michigan conflicts law was "clear" throughout the litigation. It is the specific approach to choice of law that the Michigan Supreme Court adopted in *Olmstead*. The only problem in the present case was that the District Judge did not properly apply that specific approach to the choice of law issue in the present case, but instead found "controlling" a factually distinguishable and superseded decision of a state intermediate appellate court. The Court of Appeals corrected that error and properly applied the specific approach to choice of law adopted by the Michigan Supreme Court in *Olmstead*.

It is simply preposterous to argue that a Court of Appeals must certify a question to the state courts whenever it believes that the District Judge erred in his application of settled principles of state law. And contrary to what the petitioner is now arguing, this Court has indeed "established guidelines to govern federal courts' use of state law certification procedures." (Petition for Certiorari, p. 24). These guidelines were stated in *Lehman Brothers v. Schein*, 416 U.S. 386, 394 (1974): The use of certification in a given case rests in the sound discretion of the federal court.[10] In the present case, the Court of Appeals, at the petitioner's urging, refused to certify the choice of law question to the Michigan Supreme Court. As *Lehman* makes clear, it was well within its discretion to refuse to do so.[11]

---

[10] In that case this Court held that it was up to the Court of Appeals to consider whether certification was proper and refused to order the Court of Appeals to certify the question to the state court.

[11] As now Chief Justice Rehnquist observed in *Lehman* at 394: "State certification procedures are a very desirable means by which a federal court may ascertain an undecided point of state law . . . But in a purely diversity

footnote continued

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT A. SEDLER
Wayne State University Law School
468 West Ferry
Detroit, Michigan 48202
(313) 577-3968

EDWARD M. RICCI*
Edward Ricci & Associates, P.A.
1645 Palm Beach Lakes Blvd.,
Suite 250
P.O. Box 2946
West Palm Beach, Florida 33402
(407) 684-6500
* Counsel of Record
Counsel for Respondent

---

case such as this one, the use of such a procedure is more a question of the considerable discretion of the federal court in going about the decisionmaking process than it is a question of a choice trenching upon the fundamentals of our federal-state jurisprudence."

(3)

No. 90-448

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FORD MOTOR COMPANY, ET AL.,
PETITIONERS

v.

CHRISTINE MAHNE,
RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

ARTHUR R. MILLER
Langdell Hall
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4111

JOHN M. THOMAS
Ford Motor Company
One Parklane Boulevard
Suite 300, Parklane Towers West
Dearborn, Michigan 48126
(313) 322-6743

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
MARK I. LEVY
JAMES C. SCHROEDER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

12

TABLE OF CONTENTS

	PAGE
I. THE COURT OF APPEALS IGNORED CONTROLLING STATE-COURT DECISIONS ...	2
II. THE COURT OF APPEALS FAILED TO ACCORD DUE DEFERENCE TO THE DISTRICT COURT'S DETERMINATION OF STATE LAW	5
III. THE COURT OF APPEALS FAILED TO FOLLOW AVAILABLE STATE CERTIFICATION PROCEDURES	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: *PAGE*

Elkins v. *Moreno*, 435 U.S. 647 (1978) 7, 8

Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) .. 1, 4, 5, 9

Guaranty Trust Co. v. *York*, 326 U.S. 99 (1945) . 1

Hampshire v. *Ford Motor Co.*, 399 N.W.2d 36 (Mich. App. 1986), lv. denied, 428 Mich. 852 (1987) 3, 4, 5, 6, 8

Lehman Brothers v. *Schein*, 416 U.S. 386 (1974) . 8

Olmstead v. *Anderson*, 400 N.W.2d 292 (Mich. 1987), aff'g 377 N.W.2d 853 (Mich. App. 1985) 3, 4, 6, 8

Salve Regina College v. *Russell*, cert. granted, No. 89-1629 ..... 2, 5, 6, 9

MISCELLANEOUS:

17A C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4248 (1988) 8

REPLY BRIEF FOR PETITIONERS

Our petition demonstrated that the Sixth Circuit's decision disregards this Court's pronouncements under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), for determining issues of state law in diversity cases. Thus, the court of appeals (a) declined to follow the rulings of state intermediate appellate courts, (b) declined to grant any deference to the district court's construction of state law, and (c) declined to take advantage of available state court certification procedures. Not surprisingly, the Sixth Circuit's flawed methodology produced an interpretation of both Michigan and Florida law that cannot possibly be reconciled with controlling authority in those states. As a consequence, "a suit by a non-resident litigant in [Michigan] federal court instead of in a State court a block away [will] lead to a substantially different result." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945).

Respondent endeavors to mask these defects in the court of appeals' decision by blithely asserting (Br. in Opp. 4) that—despite the district court's ruling against her—this case "involves nothing more than an application of settled principles of state law in a diversity case." She contends that the Sixth Circuit reached the right result under Michigan and Florida law and that any argument to the contrary is "desperate" (Br. in Opp. 5), "ludicrous" (*id.* at 8), "arrogan[t]" (*id.* at 10), and "preposterous" (*id.* at 11). But in addition to being incorrect, respondent's focus on state law misses the point of our petition: the Sixth Circuit misinterpreted the law of two states *because of* its fundamental misapplication of *Erie*'s precepts, which were designed to avoid just such a patently erroneous determination of state law. Accordingly, this case warrants review not because the Sixth Circuit misconstrued state law, which it plainly did, but because it rejected every

tool that this Court has identified for federal court determinations of state law.[1]

Respondent's brief in opposition is significant, moreover, as much for what it does not say as for what it does. As we explained in the petition (at 3-4), this case was filed (and dismissed) in Michigan state court and Florida state court before respondent finally found a forum that agreed with her interpretation of state law. Remarkably, respondent does not deny that this case is an example of blatant forum shopping, much less make any effort to justify her course of conduct. Nor does she dispute the practical importance of the correct determination by federal courts of state choice-of-law rules in general—or of Michigan choice-of-law rules in particular—in tort cases brought under diversity jurisdiction. See Pet. 25-28. Try as she might, respondent's attempts to mischaracterize our position and to downplay the significance of the court of appeals' ruling cannot obscure the fact that the anomalous result in this case gives diversity plaintiffs license to file suit in federal court whenever they believe that the state court would be hostile to their claims.

I. THE COURT OF APPEALS IGNORED CONTROLLING STATE-COURT DECISIONS

As respondent concedes (Br. in Opp. 7), federal courts sitting in diversity are required to follow intermediate state appellate decisions unless there is convincing evidence that the state's highest court would rule to the con-

[1] The ongoing proceedings in the district court (Br. in Opp. 2) are irrelevant to the issues raised in the petition. In the event that this Court grants certiorari or holds the petition pending a decision in *Salve Regina College* v. *Russell*, cert. granted, No. 89-1629, the district court undoubtedly would postpone further proceedings in the case in order to avoid a trial that would be completely unnecessary if the Court agrees with Ford's submission.

trary. Nonetheless, the court of appeals expressly refused to follow the decision in *Hampshire* v. *Ford Motor Co.*, 399 N.W.2d 36 (Mich. App. 1986), lv. denied, 428 Mich. 852 (1987), even though, as the district court remarked, it "presented virtually an identical set of facts" (Pet. App. 14a).

Respondent's various excuses for the Sixth Circuit's rejection of *Hampshire* cannot withstand analysis. First, contrary to respondent's assertion that *Hampshire* is "factually distinguishable" (Br. in Opp. 5-7), *Hampshire* in fact arose in circumstances essentially identical to this case: both involved defective design claims brought against Ford by plaintiffs who lived outside Michigan and who were injured in their home states in accidents in which the other drivers also lived in the same states. See Pet. 12-13.[2]

Respondent next asserts (Br. in Opp. 7) that the Michigan Supreme Court's decision in *Olmstead* v. *Anderson*, 400 N.W.2d 292 (1987), "superseded all pre-*Olmstead* decisions," including *Hampshire*. This excuse is pure fiction. As respondent acknowledges (Br. in Opp. 3), *Olmstead* applied an "interest analysis" for choice-of-law questions, which involves a consideration of "the interest of each state." That is exactly what the *Hampshire* court did (399 N.W.2d at 38), relying on the interest-weighing approach set forth in the appellate court's decision in *Olmstead* (377 N.W.2d 853 (Mich. App. 1985)), which the Michigan Supreme Court affirmed. Indeed, *Olmstead* expressly endorsed *Hampshire*, referring to it as one of the recent

[2] The fact that in *Hampshire* the plaintiff did not object initially to the application of California law (Br. in Opp. 6-7 n.5) was not the basis for the Michigan court's holding. Rather, the court's ruling that California law applied was based on "a comparison of the interests of each jurisdiction in having its law govern the case." *Hampshire*, 399 N.W.2d at 38.

"interest-weighing cases" that was the "majority" position "as well as the trend." 400 N.W.2d at 301-302. And subsequent decisions in Michigan have uniformly treated *Hampshire* as authoritative precedent on choice-of-law rules—a line of cases that respondent simply ignores. See Pet. 13 & n.5. Thus, state law is flatly inconsistent with respondent's unsupported assertion that *Olmstead* "superseded" *Hampshire* and all other prior precedent on Michigan choice-of-law rules.[3]

The Sixth Circuit's violation of controlling *Erie* principles also led to its inexplicable misreading of Florida law. The court of appeals' conclusion that Michigan law applied to this case—rather than the law of Florida, where the accident occurred, the individuals involved lived, and the vehicles were registered—was based entirely on its insupportable conclusion that "Florida has [no] interest in its law being applied" (Pet. App. 8a) because its statute of repose did not apply to non-Florida manufacturers. See *id.* at 10a-11a. Although respondent parrots the court's reasoning (Br. in Opp. 3-4, 7 n.5), she makes no effort to defend either its conclusion or its misplaced reliance on a student law review note that does *not* address the issue presented here. See Pet. 6, 16. Thus, respondent nowhere explains the Sixth Circuit's critical holding that the Florida statute of repose applied only to Florida-based corporations (see Pet. 16), much less how such a construction could possibly be constitutional. See Pet. 17 n.8. Nor does respondent answer our argument that Florida courts

---

[3] There also is no basis for respondent's related assertion (Br. in Opp. 6) that the district court disregarded *Olmstead*. In fact, the district court, noting "the demise of the traditional *lex loci delicti* rule," observed that *Olmstead* represented "the pervasive existing rule" and summarized *Olmstead* as "adopt[ing] the interests-balancing approach." Pet. App. 13a-14a.

consistently have applied the statute of repose to non-Florida manufacturers. See Pet. 14-15.[4]

In sum, Florida decisions establish that Florida has an interest in the application of its statute of repose in this case, and *Hampshire* makes clear that Michigan would respect that interest. The court of appeals' refusal to follow controlling state authority—in direct violation of this Court's decisions—therefore resulted in a decision that is contrary to the law of two states and can serve only to encourage forum shopping. Given the substantial practical importance of requiring federal courts to adhere strictly to the dictates of *Erie* in diversity cases (see Pet. 25-27), the decision below warrants further review.

II. THE COURT OF APPEALS FAILED TO ACCORD DUE DEFERENCE TO THE DISTRICT COURT'S DETERMINATION OF STATE LAW

Respondent does not take issue with our contention (Pet. 17-20) that the Sixth Circuit failed to give any deference to the district court's construction of Michigan law in this case. This Court recently granted review in *Salve Regina College* v. *Russell*, No. 89-1629, to consider whether such deference is warranted. Accordingly, it is apparent that the appropriate course is to hold this case pending the decision in *Salve Regina College*.

---

[4] Unable to defend the proposition that the Florida statute of repose applied only to Florida-based manufacturers, respondent instead contends (Br. in Opp. 4 n.3) that "[u]nder Michigan's specific approach to choice of law, it is completely irrelevant whether or not Florida would apply its statute of repose in the event that the suit had been brought there." Not surprisingly, there is no support in Michigan conflicts law for this bizarre assertion, and it was not the basis for the Sixth Circuit's ruling. What is more, respondent does not bother to explain why Florida would have a *controlling* interest in applying its statute of repose in cases brought in Florida against out-of-state manufacturers but *no* interest when the identical suits were brought elsewhere.

Respondent contends (Br. in Opp. 8), however, that the issue involved here has "no connection whatsoever" with *Salve Regina College* because, in her view, different deference rules apply depending upon whether the district court resolved an "unsettled" question of state law (as, she asserts, in *Salve Regina College*) or applied "settled" principles of state law to a particular set of facts (assertedly this case). Contrary to respondent's claim, the question presented in *Salve Regina College*—"[w]hether a party is entitled to *de novo* review of a federal district judge's determination of state law in a case in which federal jurisdiction is founded upon diversity of citizenship" (89-1629 Pet. Br. i)—makes no distinction between the types of state-law issues presented for adjudication in diversity cases. Respondent also cites no case that has adopted her theory of deference, and this Court certainly has never drawn such a distinction. See Pet. 19-20. Nor does respondent explain why *this* case raises an issue of "settled" state law—a characterization plainly belied by contrasting the court of appeals' decision with the district court's ruling and the Michigan courts' post-*Olmstead* reliance on *Hampshire*.

Respondent thus is simply wrong in arguing (Br. in Opp. 10) that "this Court's decision in *Salve Regina College*, either way, will be of no benefit whatsoever" to Ford. A reaffirmation in *Salve Regina College* that deference is required would necessarily require reconsideration of the result in this case, since it is uncontested that the court of appeals gave *no* deference at all to the district court's interpretation of state law.[5]

---

[5] As our *amicus* brief in *Salve Regina College* makes clear (at 2), we believe that the views of district judges in diversity cases are entitled to "considerable deference" on appeal. See also Pet. 19-20. Accordingly, there is no basis for respondent's portrayal (Br. in Opp. 5) of our position as one advocating absolute, unreviewable deference to district judges.

III. THE COURT OF APPEALS FAILED TO FOLLOW AVAILABLE STATE CERTIFICATION PROCEDURES

While not denying that certification is an efficient and valuable means of resolving significant and uncertain issues of state law (see Pet. 21-23), respondent contends (Br. in Opp. 11) that this Court's guidance on the use of certification procedures is unnecessary because the Court already has established "guidelines" for federal courts to follow: they must exercise "sound discretion." Under that standard, she asserts, it is "simply preposterous" (*ibid.*) that the court of appeals should have ordered certification in this case.

Assuming that "sound discretion" is a workable guideline, however, the Sixth Circuit hardly exercised it here. The court of appeals was confronted with a recent Michigan appellate decision directly on point, which had been cited with approval by the Michigan Supreme Court and had never been questioned. It also was confronted with an unbroken series of Florida cases demonstrating that Florida had an interest in applying—and, indeed, had routinely applied—its statute of repose to non-Florida manufacturers. To the extent that these state-court decisions left the Sixth Circuit with any doubt about state law, it should have followed the certification procedure in the appropriate state supreme court—not reach a result that was diametrically at odds with numerous state decisions and the ruling of the district court. The salutary purposes of state-law certification are especially important in this type of situation.

By completely ignoring the avenue of certification here, the Sixth Circuit stands in marked contrast to the liberal invocation of state certification procedures followed by other courts of appeals and urged by commentators. See Pet. 21-23. Indeed, this Court "do[es] not hesitate to avail [itself] of [that procedure]." *Elkins* v. *Moreno*, 435 U.S.

647, 663 n.16 (1978).[6] The Court repeatedly has encouraged lower federal courts to take advantage of available certification procedures, and numerous states have adopted such procedures. See 17A C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4248 at 164-167 (1988). This case demonstrates, however, that encouragement alone is not enough. This Court's further guidance is required if certification is to achieve its goal of "help[ing] build a cooperative judicial federalism." *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974).

In the end, this case raises broad and important questions concerning the proper approach of the federal courts to state-law issues in diversity suits. The Sixth Circuit refused to employ *any* of the tools established by this Court for ascertaining state law—following state intermediate appellate court decisions, deferring to district court interpretations of state law, and certifying state-law issues to the state courts if the correct outcome is uncertain under existing precedent. Instead, the court below set off on its own unguided determination of state law.

---

[6] The legitimacy of Ford's request for certification is not called into question because it was first raised in Ford's petition for rehearing. In *Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974)—which, like this case, involved a choice-of-law question—the losing party in the court of appeals first requested certification in its rehearing petition (*id.* at 392-393) (Rehnquist, J., concurring). Nevertheless, this Court did not hesitate to vacate the judgment of the court of appeals and remand the case for consideration of certification in light of the Court's opinion.

Moreover, in this case, Ford's position on certification was perfectly logical. As explained above, *Hampshire* is on all fours with this case, was cited with approval in *Olmstead*, followed the same analytical approach as *Olmstead*, and (until the Sixth Circuit's ruling) had consistently been treated as good law in post-*Olmstead* decisions. In addition, Florida had uniformly applied its statute of repose to benefit non-Florida manufacturers. Because state law was thus clear, there was no need for certification until the court of appeals abruptly departed from prior precedent.

As a result, it issued a ruling that would not have been rendered by the state courts in Michigan or Florida and that necessarily rewards and encourages the most transparent form of forum shopping. The decision below is in direct violation of *Erie* and should not be allowed to stand.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to hold the petition pending decision in *Salve Regina College* v. *Russell*, No. 89-1629.

Respectfully submitted.

ARTHUR R. MILLER
Langdell Hall
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4111

JOHN M. THOMAS
Ford Motor Company
One Parklane Boulevard
Suite 300, Parklane Towers West
Dearborn, Michigan 48126
(313) 322-6743

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
MARK I. LEVY
JAMES C. SCHROEDER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioners

OCTOBER 1990